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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can one labor union ever be the agent of another independent labor union for purposes of liability under the secondary boycott provisions of the National Labor Relations Act?

2. Under the National Labor Relations Act, in order to impose liability on one union for the acts of another, must one union be formally affiliated with or otherwise have a right to control the other, as the D.C. Circuit held here, or is it sufficient, as the Eleventh Circuit has held, for the NLRB to find that one union encouraged and requested the other to act, the first union aided the other in carrying out those actions on its behalf, the second union agreed to act and then ceased its conduct when the first union requested it to, and the requesting union affirmed and ratified the other union's activities?

RULE 29.6 LIST OF CORPORATIONS RELATED TO CORPORATE PARTIES

Canaveral Port Authority is a governmental entity of the State of Florida. Coastal Stevedoring Company is an operating division of Bernard Egan & Company, a privately-owned corporation. Port Canaveral Stevedoring, Ltd., is a Florida limited partnership. The general partner is Port Canaveral Stevedoring, Inc. The members of the limited partnership are or were Patrick T. Lee, W.T. Cox, Jr., Mather Ward, George Scheidler, and the Ben Pekin Family Partnership. Port Canaveral Stevedoring, Ltd. is affiliated with Mid-Florida Freezer Warehouse, Ltd., a Florida limited partnership with the same limited partners. None of these limited partnerships or corporations has issued shares or debt to the public.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	30

TABLE OF AUTHORITIES

Page

Cases:

Allegany Aggregates, Inc.,
311 NLRB 1165 (1993) 18

BE & K Constr. Co. v. NLRB,
23 F.3d 1459 (8th Cir. 1994),
cert. denied sub nom. Local 783, Bridge Structural Workers v. BE & K Constr. Co., 115 S. Ct. 721 (1995) 16, 20, 21

Baldovin v. ILA,
626 F.2d 445 (5th Cir. 1980) 7

Beth Israel Hosp. v. NLRB,
437 U.S. 483 (1978) 28

Bricklayers, Masons & Tile Setters (IC Minium),
174 NLRB 1251 (1969) 19

Carpenters Dist. Council of Milwaukee County and Vicinity (Westra Constr., Inc.),
224 NLRB 1071 (1976) 19

Carpenters Union Local 102 (Frederick Meiswinkel, Inc.),
260 NLRB 972 (1982) 19

Table of Authorities Continued

Page

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 29

Dowd v. ILA, 975 F.2d 779 (11th Cir. 1992) . . . . . *passim*

Dowd v. ILA, 781 F. Supp. 1565 (M.D. Fla. 1991) 7

F&D Enters., Inc., 251 NLRB 1199 (1980) 19

Feather v. United Mine Workers, 903 F.2d 961 (3d Cir. 1990) 20

Furr's Inc. v. NLRB, 381 F.2d 562 (10th Cir.), *cert. denied*, 389 U.S. 840 (1967) 16

H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941) 9

House Calls, Inc., 304 NLRB 311 (1991) 21

ILA v. Allied Int'l, 456 U.S. 212 (1982) 11, 13, 14

ILA (Shipside Packing Co.), 227 NLRB 659 (1976) 9, 10, 18, 19

Table of Authorities Continued

Page

Iron Workers Dist. Council of Pacific Northwest v. NLRB, 913 F.2d 1470 (9th Cir. 1990) 16

Iron Workers Local 197 (Del Guidice Enters.), 291 NLRB 1 (1988), *enforced*, 912 F.2d 468 (9th Cir. 1990) 19

Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351 (6th Cir. 1983) 16

Local 1814, ILA v. NLRB, 735 F.2d 1384 (D.C. Cir.), *cert. denied*, 469 U.S. 1072 (1984) 9, 21

Local 1976, United Bhd. of Carpenters & Joiners, 357 U.S. 93 (1958) 14

Machinists v. NLRB, 311 U.S. 72 (1940) 9

National Cash Register Co. v. NLRB, 466 F.2d 945 (6th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973) 21

NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304 (5th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) 15, 16

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 11, 28, 29

Table of Authorities Continued

Page

NLRB v. Denver Bldg. & Constr. Trades Council,
341 U.S. 675 (1951) 13

NLRB v. Erie Resistor Corp.,
373 U.S. 221 (1963) 28

NLRB v. Georgetown Dress Corp.,
537 F.2d 1239 (4th Cir. 1976) 15

NLRB v. Omaha Bldg. and Constr. Trades Council,
856 F.2d 47 (8th Cir. 1988) 19

NLRB v. Servette, Inc.,
377 U.S. 46 (1964) 14

NLRB v. United Food & Commercial Workers Union,
484 U.S. 112 (1987) 29

NLRB v. Urban Tel. Corp.,
499 F.2d 239 (7th Cir. 1974) 16

National Marine Eng'rs Beneficial Ass'n v. NLRB,
274 F.2d 167 (2d Cir. 1960) 19

National Woodwork Mfrs. Ass'n v. NLRB,
386 U.S. 612 (1967) 13, 14

Phoenix Canada Oil Co. v. Texaco, Inc.,
842 F.2d 1466 (3d Cir.),
cert. denied, 488 U.S. 908 (1988) 17

Table of Authorities Continued

Page

Pipefitters Local 280 (Aero Plumbing Co.),
184 NLRB 398 (1970) 9, 10, 18

Service Employees Union, Local 87 (West Bay Bldg. Maintenance),
291 NLRB 82 (1988) 21

Star Kist Samoa, Inc.,
237 NLRB 238 (1978) 21

Technodent Corp.,
294 NLRB 924 (1989) 21

3-E Co. v. NLRB,
26 F.3d 1 (1st Cir. 1994) 15, 22

United Bhd. of Carpenters & Joiners v. United States,
330 U.S. 395 (1947) 11, 15

Williamson Piggly Wiggly, Inc. (UFCW Local 347),
280 NLRB 1160 (1986), *enforced*,
827 F.2d 1098 (6th Cir. 1987) 21

Woodworkers (Central Veneer, Inc.),
131 NLRB 189 (1961) 21

Worley Mills, Inc. v. NLRB,
685 F.2d 362 (10th Cir. 1982) 16

Table of Authorities Continued

Page

Statutory Provisions:

28 U.S.C. § 1254(l) 2

29 U.S.C. § 152(13) 3, 15

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29 U.S.C. § 158(b)(4)(ii)(B) 2, 9

29 U.S.C. § 160(f) 9

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Page

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Daily Lab. Rep. (BNA), Aug. 9, 1990 26

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Table of Authorities Continued

Page

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Restatement (Second) of Agency (1958) . . . . . *passim*

U.S. Dep't Labor,
Foreign Labor Trends: Canada (1994-95) 24

U.S. Dep't Labor,
Foreign Labor Trends: Germany (1994-95) 25

U.S. Dep't Labor,
Foreign Labor Trends: Japan (1994-95) 24

U.S. Dep't Labor,
Foreign Labor Trends: United Kingdom
(1994-95) 24

IN THE

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October Term, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,
Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Canaveral Port Authority, Coastal Stevedoring Company, and Port Canaveral Stevedoring, Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-23a) is officially reported at 56 F.3d 205 and appears at 149 L.R.R.M. (BNA) 2449 and 130 Lab. Cas. CCH ¶ 11,369. The opinion of the National Labor Relations Board (App. 24a-47a) is officially reported at 313 NLRB 412 and appears at 144 L.R.R.M. (BNA) 1273 and 1993-94 CCH NLRB ¶ 15,146. An earlier opinion of the Eleventh Circuit Court of Appeals affirming a temporary injunction against the International Longshoremen's Association (App. 50a-72a) is officially reported at 975 F.2d 779 and appears at 141 L.R.R.M. (BNA) 2489 and 123 Lab. Cas. (CCH) ¶ 10,408.

JURISDICTION

The Court of Appeals entered its judgment on June 6, 1995. Petitioners' timely petitions for rehearing with suggestion for rehearing en banc were denied on August 30, 1995 (App. 48a-49a). This petition is filed within ninety days of said order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B), provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an

> object thereof is . . . (B) forcing or requiring any person . . . to cease doing business with any other person. . . .

Section 2(13) of the National Labor Relations Act, 29 U.S.C. § 152(13), provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT

This case involves the determination of the National Labor Relations Board ("NLRB" or "Board") upon a stipulated record that a U.S. labor union, the International Longshoremen's Association ("ILA"), was responsible for acts committed by Japanese labor unions that threatened and coerced neutral employers, in violation of the secondary boycott provisions of the National Labor Relations Act ("NLRA" or "Act"). The ILA stipulated that it had a secondary objective and that neutral employers in the United States and abroad were threatened and coerced. The Board found that neutral employers had been threatened and coerced by the threat of a work stoppage in Japan, made by Japanese unions at the ILA's request and for the ILA's benefit, which the ILA subsequently condoned and ratified.

The Board held on these stipulated facts that the Japanese unions were the agents of the ILA, because the ILA actually authorized and ratified their conduct taken on its behalf. The Board based its decision on longstanding principles of

agency law as applied under the NLRA to unions and employers. The Board also concluded that any contrary result would frustrate the purposes of the NLRA's broad secondary boycott prohibitions. The Court of Appeals refused to enforce the Board's Order, holding that the Board erred as a matter of law in concluding that one union could ever be the agent of another independent union.

1. Coastal Stevedoring Company ("Coastal") and Port Canaveral Stevedoring, Ltd. ("Canaveral Stevedoring") are non-union stevedoring companies that operate respectively in Fort Pierce, Florida, and Cape Canaveral, Florida.. In the late 1980s, and continuing until the present, the ILA has had a "primary" labor dispute with Coastal and Canaveral Stevedoring because those companies do not have collective bargaining agreements with the ILA.

Florida's major export is citrus, and Japan is the major importer of Florida citrus. Japanese importers contract with U.S. growers to purchase citrus, and with shipping companies to deliver the fruit. The selection of which port to use for shipment, and thus which stevedoring company will be used, is made by the shipping lines and the Japanese importers. When shipments arrive in Japan, they are unloaded by employees of Japanese stevedoring companies represented by the National Council of Dockworkers Unions ("Dockworkers"). Importers are in regular contact with U.S. stevedoring companies, Florida growers, exporters, warehouses, and other U.S. companies through telephone calls, telex or fax transmissions, and periodic visits to Florida. App. 5a-6a, 27a-29a.

In the late 1980s, Japanese importers turned with increasing frequency to the ports of Canaveral and Fort Pierce on the east coast of Florida to handle citrus exports, instead of the west-coast port of Tampa, where most stevedoring companies are organized by the ILA. In the spring of 1989, a senior delegation of ILA representatives visited Japan for the express purpose of soliciting Japanese unions to put pressure on importers and shipping companies not to do business with Coastal and Canaveral Stevedoring. Stip. Facts, ¶¶ 15-16. The unions solicited included the Dockworkers, the Japan Seamen's Union, and various union federations ("the Japanese Unions"). No immediate action was taken by the Japanese Unions.

ILA representatives returned to Japan in April 1990 for meetings with merchants, shipping companies, and the Japanese Unions, in order to pressure neutrals not to do business with Coastal or Canaveral Stevedoring. The ILA followed these meetings with written requests. The Japanese Unions responded by disseminating communications to stevedoring companies, citrus importers, and shipping companies doing business in the U.S. and Japan, asking the recipients to ensure that Japan-bound citrus fruit was loaded in Florida by ILA-represented employees. These letters did not have the immediate effect sought by the ILA. Stip. Facts, ¶¶ 17-23. In October 1990, shortly before the export season began, the ILA's President wrote to the Dockworkers' President that the ILA was planning to picket at Fort Pierce and Port Canaveral. The letter closed: "Your further support in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the International Longshoremen and

organized labor in the United States which supports our efforts." App. 6a.

The Japanese Unions circulated copies of the letter to citrus importers, exporters, and shipping companies. Faxes were circulated around the world concerning the threats of work stoppage in Japan. Some of these communications attached the ILA's letter and indicated that the requests were coming from the ILA through the Japanese Unions. Stip. Facts, ¶¶ 27-33, 35-46, Ex. 21.

The threatened boycott succeeded. Ships that were originally scheduled to be loaded at Fort Pierce were instead diverted to Tampa, where they were loaded by ILA-represented stevedoring companies. In November 1990, another letter was sent by the ILA to the Dockworkers. It stated that the diversion of a particular ship was "a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts." It added, "Your continued efforts *on our behalf* will be most appreciated." App. 73a (emphasis added).

The Japanese Unions' threats not to unload fruit that had been loaded by non-union labor caused all the citrus exports from Florida to Japan during the 1990-1992 export seasons to be shipped through the Port of Tampa.

2. Canaveral Port Authority, Coastal, and Canaveral Stevedoring filed unfair labor practice charges with the Board in November and December of 1990. A complaint was issued alleging that the ILA had violated the Act's secondary boycott provisions, Section 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii), by threatening, coercing, or restraining neutral employers with an unlawful objective. The Board

obtained an injunction pursuant to Section 10(l) of the Act, which directed the ILA to refrain from threatening persons neutral to the dispute and to repudiate its written request soliciting the aid of the Japanese Unions. *Dowd v. ILA*, 781 F. Supp. 1565 (M.D. Fla. 1991).[1]

The ILA appealed the injunction to the Eleventh Circuit Court of Appeals, stressing the two legal defenses that it later repeated to the Board and the D.C. Circuit -- agency and jurisdiction. The Eleventh Circuit rejected the ILA's arguments and affirmed the injunction. *Dowd v. ILA*, 975 F.2d 779 (11th Cir. 1992) ("*Dowd*"); App. 50a-72a. The ILA thereupon complied with the injunction and withdrew its request to the Japanese Unions, which resulted in a return of citrus exports to Port Canaveral and Fort Pierce.

The parties waived a hearing and an Administrative Law Judge's decision and submitted the case directly to the Board on a stipulation of facts. The ILA argued that as a matter of law, the Board could not reach its conduct. A unanimous Board concluded that the ILA, acting through the Japanese Unions, had violated Section 8(b)(4)(ii). One of the NLRB's conclusions of law, which was not challenged on appeal, was that the boycott threatened, coerced, or restrained "shipping agents, shipping companies, citrus exporters, citrus importers, the Canaveral Port Authority, and other persons

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[1] Section 10(l) of the NLRA, 29 U.S.C. § 160(l), authorizes federal district courts to issue injunctive relief pending the Board's resolution of certain unfair labor practice charges, such as the secondary boycott charges at issue in this case. The district court's role in Section 10(l) proceedings is to determine "whether there is reasonable cause to believe that a violation of the Act has occurred." *Baldovin v. ILA*, 626 F.2d 445, 454 (5th Cir. 1980).

engaged in commerce or in an industry affecting commerce, who are neutral to the dispute. . . ." App. 42a-43a. The stipulated facts also showed substantial, adverse effects on employers doing business in the U.S.[2]

The ILA's primary argument was that the Board lacked jurisdiction over conduct that had occurred in Japan. The ILA also contended that it could not be held responsible for the acts of the Japanese Unions. The NLRB rejected both of these contentions, following the analysis of the Eleventh Circuit in *Dowd*.[3]

The Board noted that while the Taft-Hartley Amendments of 1947 expressly incorporated the common law of agency

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[2] Canaveral Port Authority, a governmental entity neutral to the dispute, suffered a substantial loss of revenues as a result of lost tariffs on ships destined for Japan. Stip. Facts, ¶¶ 12, 53. Other neutral U.S. employers that were pressured or coerced by this boycott included U.S. growers and U.S.-based exporters of citrus; shipping companies and carriers, including European companies and their U.S. affiliates who did business in Florida; and Japanese importers doing business in Florida. App. 39a. Between 16 and 20 vessels changed ports in the U.S., and over 2,000 truckloads of citrus were shifted across the State of Florida. These disruptions created problems with fruit quality and increases in transportation, warehousing, and stevedoring costs. Stip. Facts, ¶¶ 51-52.

[3] On the issue of jurisdiction, which is not before this Court, the Eleventh Circuit noted that the boycott caused substantial adverse effects within the United States, disrupting relationships among U.S. growers, U.S. exporters, shipping companies, importers, and stevedoring companies. As a matter of statutory construction, congressional intent, and precedent, the Board concurred with the Eleventh Circuit that the Act covered conduct abroad by U.S. unions and their agents that was intended to and did have substantial domestic effects, and where the intent of the ILA was to impact a U.S. labor dispute. App. 39a-42a.

into the Act, "[w]hen applied to labor relations . . . agency principles must be broadly construed in light of the legislative policies embedded in the Act."[4] App. 33a. The ILA conceded in its brief and at oral argument that "it induced the Japanese Unions to engage in a secondary boycott, which boycott would have been in violation of Section 8(b)(4)(ii)(B) had it been conducted by a U.S. union on U.S. territory." App. 34a. The Board agreed that if the same threats had been made by a U.S. union in the United States, instead of by a Japanese union, the ILA would have been held responsible for the threats under Section 2(13) of the Act. The Board found, applying the law to these stipulated facts, that the Japanese Unions acted on behalf of the ILA and that the ILA was acting through the instrumentality of the Japanese Unions. App. 34a-38a.[5]

3. The ILA appealed to the D.C. Circuit pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f). That court reversed the Board. Without reaching the issue of jurisdiction, the court held that the ILA could not be found responsible as a matter of law for the acts of the Japanese Unions. The court granted only limited deference to the Board, stating that the questions of agency and responsibility under Sections 2(13) and 8(b)(4) were questions of law. The court looked to common-law principles of agency as set forth

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[4] The Board cited and relied on *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 521 (1941); *Machinists v. NLRB*, 311 U.S. 72, 80 (1940); and *Local 1814, ILA v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir.), *cert. denied*, 469 U.S. 1072 (1984). App. 34a.

[5] The Board cited *Pipefitters Local 280 (Aero Plumbing Co.)*, 184 NLRB 398 (1970) and *ILA (Shipside Packing Co.)*, 227 NLRB 659 (1976). App. 35a-36a.

in the *Restatement (Second) of Agency*; stated that the ILA did not exercise any control over the Japanese Unions; and held that one independent labor union could not be the agent of another.[6] App. 15a-22a.

The Court of Appeals distinguished the Board's *Aero Plumbing* and *Shipside Packing* precedents as involving local unions affiliated with the same parent union, bound by a formal affiliation and a common agreement. The Court of Appeals also distinguished NLRA cases where employers have been held responsible for the actions of third parties conducting anti-union campaigns, concluding that those cases turned on issues of apparent authority rather than actual authority. App. 17a-21a. The court concluded that the ILA and the Japanese Unions were completely independent, that neither exercised any control over the other, that if they were bound together at all, it was by a "spirit of labor solidarity," and that this "spiritual link is too frail to render one union the agent of another." App. 5a, 17a. Without discussing the reasoning of *Dowd*, the D.C. Circuit stated that to the extent that the Eleventh Circuit had reached a contrary conclusion, it disagreed. App. 22a.

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[6] The Court of Appeals did not cite any authority or precedent under the Act supporting its agency analysis; did not discuss the common-law principle of ratification, which had been cited by both the Eleventh Circuit and the NLRB and had been argued to the court; and did not address the other circumstances in which unions have been held responsible for the acts of other unions, including joint ventures.

REASONS FOR GRANTING THE PETITION

In the Labor Management Relations Act of 1947, amending the NLRA, Congress removed a major weapon from the arsenal of organized labor by banning secondary boycotts. Congress expanded this proscription in 1959 amendments, specifically adding Section 8(b)(4)(ii) to prohibit threats to neutrals. The Board has developed a substantial body of law to protect neutral employers from being embroiled in the disputes of others, and this Court has affirmed the breadth of the Act's secondary boycott proscription. *ILA v. Allied Int'l*, 456 U.S. 212 (1982).

In 1947 Congress also added Section 2(13) to the NLRA to broaden the situations in which one entity could be held responsible for the acts of another, and to reject the restrictive application of agency principles in *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395 (1947). The Board and the courts have subsequently given common-law agency principles a broad interpretation in a variety of contexts to prevent unions and employers from doing indirectly what they cannot do directly.

In this case the Board, applying well-established precedent, rejected the ILA's contention that there was a loophole in the NLRA allowing a U.S. union lawfully to orchestrate secondary boycotts so long as it acted outside U.S. territory or used a foreign labor union as its intermediary. The Board, which has been given "primary responsibility for developing and applying national labor policy," *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990), concluded that Congress did not intend that U.S. unions be able to escape the Act's secondary boycott

provisions through the expedient of acting through foreign (or domestic) entities that are technically independent, however closely they may be bound by common interests and objectives. The Board's conclusions of law echoed those of the Eleventh Circuit in *Dowd*.

The D.C. Circuit's rejection of the Board's holding creates a major gap in the NLRA's secondary boycott provisions. The decision will disrupt international trade, enhance labor unrest, place a substantial burden on neutral employers here and abroad, and severely constrain the Board's ability to enforce the Act. The immediate impact of the decision is to allow U.S. unions to circumvent the Act's secondary boycott provisions by enlisting foreign unions to pressure, coerce, or threaten overseas parents, subsidiaries, suppliers, customers, and others in aid of U.S. labor disputes, with complete impunity. Moreover, the decision will have far greater implications for both union and employer conduct because the applicable legal standards of vicarious liability are the same throughout the Act.

The proposition that unions can so easily circumvent the Act is extremely important to employers in many industries. There is a conflict between the D.C. Circuit and the Eleventh Circuit on the same facts. The broader issues of agency and responsibility are recurring ones that are important to the administration of the Act, and the D.C. Circuit's approach is contrary to that of virtually every other circuit. In order to resolve these conflicts and affirm Congress' proscription of secondary boycotts, this Court's review is warranted.

1. Section 8(b)(4)(ii) of the Act implements the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). This "secondary boycott" provision prohibits a union that has a dispute with one employer, the "primary," from pressuring other "secondary" employers, where the union's conduct is calculated to force the secondary or "neutral" employer to cease dealing with the primary employer, or with others, and thus increase the union's leverage in its primary labor dispute. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 632-34 (1967). The NLRA's secondary boycott provisions were designed to prevent imposing heavy burdens on neutral employers and widening of industrial strife. *Allied*, 456 U.S. at 223.

In *Allied*, the "Russian boycott" case, the Court held the ILA responsible for pressuring numerous neutral employers, even though the pressure was not the sole object of the boycott and the ILA's ultimate objective was the pursuit of a political dispute with a foreign nation. In contrast with *Allied*, the ILA's actions in this case are a more classic example of proscribed secondary activity. The Board found upon stipulated facts that the ILA's objective was to pressure neutral employers in aid of a primary dispute with Coastal and Canaveral Stevedoring, and the ILA did not challenge this finding. As in *Allied*, the pressure of neutral employers by the ILA was both foreseeable and intentional.

The Court explained in *Allied* the importance and breadth of the prohibition on secondary boycotts:

> The prohibition was drafted broadly to protect neutral parties, "the helpless victims of quarrels that do not concern them at all." H.R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947). Despite criticism from President Truman as well as from some legislators that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. Recognizing that "[i]llegal boycotts take many forms," *id.*, at 24, Congress intended its prohibition to reach broadly.
>
> * * *
>
> In the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms.

Allied, 456 U.S. at 225.[7]

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[7] The D.C. Circuit quoted *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 98 (1958), for the proposition that Congress did not intend a sweeping prohibition of secondary boycotts, without mentioning the more recent opinion in *Allied*. App. 3a, 21a. Significantly, in 1959, the year after *Carpenters Local 1976* was decided, Congress amended the Act to close loopholes in the application of Section 8(b)(4), and specifically to reach threats to secondary employers. *See NLRB v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964). Another of the loopholes closed by Congress was the *Local 1976* case, which had approved "hot cargo" clauses. *National Woodwork Mfrs. Ass'n*, 386 U.S. at 633-35. The specific language of Section 8(b)(4)(ii) at issue in this case, and discussed in *Allied*, did not exist when the *Local 1976* case was decided. Thus, the D.C. Circuit's discussion of *Local 1976* to describe the purpose and intent of Subsection (ii) was not accurate.

2. The D.C. Circuit's strict application of common-law principles to the NLRA is in conflict with the approach of virtually every other circuit. As the Court of Appeals correctly noted, Section 2(13) of the Act was added as part of the 1947 amendments to overrule the decision in *United Bhd. of Carpenters & Joiners v. United States*. In *Carpenters*, the Court construed what was then Section 6 of the Norris-LaGuardia Act to relieve unions and employers from liability for unlawful acts of their members without clear proof that the organization or member actually participated in, gave prior authorization to, or ratified such acts after actual knowledge of their perpetuation. Congress thereafter enacted Section 2(13) to reverse that decision.

There is no dispute that the addition of Section 2(13) was intended to make it easier to hold one party responsible for the acts of another. The Court of Appeals cited portions of the legislative history for the proposition that this amendment was designed to render both employers and labor unions responsible for the acts of their agents in accordance with the ordinary common-law rules of agency, which are strictly applied. This holding is in conflict with the approach of virtually all other circuits that have considered the issue, which have concluded that under Section 2(13), common-law concepts are to be applied liberally.[8] The Court of Appeals,

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[8] *See, e.g., 3-E Co. v. NLRB*, 26 F.3d 1, 3-4 (1st Cir. 1994) ("in this labor context, courts utilize a liberal agency analysis, emphasizing such factors as a supervisor's 'apparent authority'"); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976) ("the common law has been liberalized by § 2(13) of the Act"); *NLRB v. Big Three Indus. Gas & Equip. Co.*, 579 F.2d 304, 309 n.4 (5th Cir. 1978) ("The statutory test for imputing liability is based upon principles of agency to be applied expansively in accordance with the underlying

while purporting to give some deference to the Board's judgment,[9] concluded that the Board's analysis was contrary to common-law agency law as recognized in the *Restatement (Second) of Agency*.

3. The D.C. Circuit's determination that one independent union cannot be the agent of another union for purposes of liability under the Act is a misapplication of common-law agency principles, and is contrary to substantial NLRB precedent and to the stipulated facts. The Court of Appeals relied on the proposition that an agency relationship arises only where the principal "'has the right to control the conduct of the agent with respect to matters entrusted to him.'" App. 16a (citations omitted). The Court of Appeals

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policy of the Act."), *cert. denied*, 440 U.S. 960 (1979); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) ("[c]ommon law principles of agency . . . are not to be rigidly applied"); *NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 243 (7th Cir. 1974) ("the courts have always liberally construed the principles of agency"); *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459, 1466 (8th Cir. 1994) ("[t]he courts . . . have liberally construed the various principles of agency in determining employer or union liability for an unfair labor practice."), *cert. denied sub nom. Local 783, Bridge Structural Workers v. BE & K Constr. Co.*, 115 S. Ct. 721 (1995); *Furr's Inc. v. NLRB*, 381 F.2d 562, 566 (10th Cir.) ("employer responsibility is not to be determined according to the strict rules of agency"), *cert. denied*, 389 U.S. 840 (1967); *Dowd*, 975 F.2d at 785; App. 57a-58a.

[9] The D.C. Circuit's conclusions about the degree of deference to be given to the Board's finding of responsibility is at odds with the conclusions of other circuits. *See, e.g., BE & K Constr.*, 23 F.3d at 1466; *Iron Workers Dist. Council of Pacific Northwest v. NLRB*, 913 F.2d 1470, 1477 (9th Cir. 1990); *Kitchen Fresh*, 716 F.2d at 355; *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 366 and n.2 (10th Cir. 1982).

then reached the conclusion, without citation to any record evidence, that "[h]ere, the ILA exercised no control over the conduct of the Japanese unions. To the contrary, the ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the goals of organized labor worldwide." App. 17a.

First, the Court of Appeals misconstrues the applicable common-law principles, even assuming they apply to Section 2(13). Totally independent entities can be agents of one another, such as one corporation acting as the agent of another. *Restatement (Second) of Agency* § 14M cmt. a (1958); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477-78 (3d Cir.), *cert. denied*, 488 U.S. 908 (1988). At common law, the amount of "control" necessary for the creation of an agency relationship is minimal. An agency relationship can even be established when one "asks a friend to do a slight service for him, such as to return for credit goods recently purchased from a store . . . ." *Restatement (Second) of Agency* § 1 cmt. b (1958). Control can be exercised "by prescribing what the agent shall or shall not do before the agent acts" and does not "include control at every moment." *Id.* § 14 cmt. a.

Second, the record strongly supports the finding that the ILA had sufficient "control" under the *Restatement* test. In this case, the ILA's "control" follows irrefutably from the undisputed facts -- that the Japanese Unions did precisely what the ILA asked them to do in April 1990 (communicate their concerns to specific third parties), what the ILA asked them to do in October 1990 (threaten neutral shippers and importers with work stoppages), and what the ILA asked them to do in November 1990 (continue to threaten to refuse

to unload vessels). Equally telling is that when the ILA asked the Japanese Unions to stop, they did so.

The Court of Appeals also ruled that in order to find agency it was necessary that there be some formal affiliation and agreement. No such relationship is required. In fact, a special agent can be authorized to conduct only a single transaction. *Restatement (Second) of Agency* § 3(2) (1958). There is no need for an exchange of consideration; gratuitous agencies can create legal rights and responsibilities. *Id.* §§ 16 cmt. a, 379(2) cmt. e. All that is necessary is that there be a manifestation by the principal that the agent act on his account and that the agent agree to so act. This manifestation by either party may be oral, written, *or by conduct*. *Id.* § 26.

The NLRB found such an agreement. The Board concluded, based upon stipulated facts, that:

> The [Japanese] unions granted the [ILA's] request. Asserting that they were acting on behalf of and in support of the Respondent, the unions threatened various neutral shippers, importers, and exporters.

App. 36a.

The Court of Appeals' analysis is contrary to Board precedent. The NLRB has never required a formal affiliation or extensive control to impose liability on a union for the acts of others.[10] In *Aero Plumbing* and *Shipside*

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[10] The Board has held that Section 2(13) does *not* require that an alleged agent be under the direction and control of the purported principal. *E.g.*, *Allegany Aggregates, Inc.*, 311 NLRB 1165, 1168 n.6

Packing, the Board found that one union local had authorized or ratified the acts of another and could thus be held responsible, despite the general rule that locals of the same international union are *not* agents of each other by virtue of their membership in the same international union. The test in each case is whether there was authorization, ratification, or some other basis on which to impose responsibility. An agency relationship has been found, for example, where the business agent of one union was requested by another union to make threatening statements, or the second union ratified threats on the first's behalf. Although some of these cases have involved sister locals, others have not.[11] The Board and courts have previously suggested that one union *can* be deemed to act as the agent of another, independent union.[12] Numerous Board and court decisions have imposed liability

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(1993); *F&D Enters., Inc.*, 251 NLRB 1199, 1207 n.13 (1980) (noting the Board's failure even to discuss this factor in its determinations of responsibility).

[11] *See, e.g., Iron Workers Local 197 (Del Guidice Enters.)*, 291 NLRB 1, 2-3 (1988), *enforced*, 912 F.2d 468 (9th Cir. 1990); *Carpenters Union Local 102 (Frederick Meiswinkel, Inc.)*, 260 NLRB 972, 974 (1982).

[12] *See, e.g., NLRB v. Omaha Bldg. and Constr. Trades Council*, 856 F.2d 47, 50-51 (8th Cir. 1988); *National Marine Eng'rs Beneficial Ass'n v. NLRB*, 274 F.2d 167, 171 (2d Cir. 1960). The D.C. Circuit's decision is also contrary to the decisions applying the related doctrine of joint venture, holding that two independent unions can agree to a common objective, where each member union is deemed to constitute the agent of all of them. *E.g., Bricklayers, Masons & Tile Setters (IC Minium)*, 174 NLRB 1251, 1261 (1969); *Carpenters Dist. Council of Milwaukee County and Vicinity (Westra Constr., Inc.)*, 224 NLRB 1071, 1080 (1976).

on unions for unauthorized work stoppages or secondary boycotts when union officials instigated, participated in, actively encouraged, supported, or ratified the conduct.[13]

The D.C. Circuit's decision disregards -- and indeed does not even discuss -- the common-law principle of ratification, even though it was argued to the court. The Board found that "the [ILA] applauded the unions' 'timely and effective action' and requested their continued action on [the ILA's] behalf." The Board concluded that the ILA's actions amounted to "authorization and ratification of conduct." App. 36a, 38a.

Ratification imposes liability when a person affirms a prior act which otherwise did not bind him, but was done or purportedly done on his account, creating *ex post facto* an agency relationship. *Restatement (Second) of Agency*, §§ 82, 83 cmt. b, 94 (1958). The Board made a factual finding, not addressed on appeal, that the Japanese Unions threatened neutral parties "on behalf of" the ILA, the ILA "received direct benefits from the requested action," and the ILA's November 1990 letter indicated that the ILA adopted, ratified, and affirmed the Japanese Unions' conduct taken "on our behalf" and authorized the Japanese Unions to continue that conduct. App. 36a, 38a. The Board previously has imposed liability on unions for the conduct of others, including complete strangers, which union officials

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[13] *See, e.g., BE & K Constr.*, 23 F.3d at 1466-70; *Feather v. United Mine Workers*, 903 F.2d 961, 970 (3d Cir. 1990).

ratified.[14] Courts similarly have imposed liability when a union ratified or failed to disavow acts purportedly done on its behalf.[15]

The Court of Appeals' decision almost certainly will have far-reaching implications beyond the secondary boycott context. Section 2(13) and principles of vicarious liability apply equally to unions and employers and to all types of unfair labor practices.[16] Contrary to the assertion of the Court of Appeals, those cases holding employers responsible for the acts of third parties in anti-union organizing campaigns and other contexts are not premised solely upon the doctrine of apparent authority; the Board also applies the doctrines of authorization and ratification.[17] The D.C. Circuit's interpretation of "agency" abrogates longstanding Board precedent and could result in employers violating the

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[14] *E.g.*, *Service Employees Union, Local 87 (West Bay Bldg. Maintenance)*, 291 NLRB 82, 83 (1988); *Woodworkers (Central Veneer, Inc.)*, 131 NLRB 189, 190 (1961).

[15] *E.g.*, *BE & K Constr.*, 23 F.3d at 1466-67; *National Cash Register Co. v. NLRB*, 466 F.2d 945, 959-61 (6th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).

[16] H.R. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947); *Local 1814*, 735 F.2d at 1394 and n.15.

[17] *E.g.*, *House Calls, Inc.*, 304 NLRB 311, 312 (1991); *Technodent Corp.*, 294 NLRB 924, 928 (1989); *Williamson Piggly Wiggly, Inc. (UFCW Local 347)*, 280 NLRB 1160, 1165-66 (1986), *enforced*, 827 F.2d 1098 (6th Cir. 1987); *Star Kist Samoa, Inc.*, 237 NLRB 238, 246 (1978).

NLRA with impunity through the use of independent entities.[18]

4. The D.C. Circuit's analysis and conclusions are in direct conflict with those of the Eleventh Circuit in *Dowd*. When the Eleventh Circuit looked at the same facts, it had no difficulty applying the theories of actual authorization and ratification to hold the ILA responsible for the acts of the Japanese Unions. The Eleventh Circuit specifically rejected the idea that a formal right of control was necessary, noting the NLRA precedents in which employers had been found to authorize the acts of unrelated third parties. The Eleventh Circuit also interpreted the ILA's November 1990 letter as being an affirmance of conduct performed on the ILA's behalf, which was sufficient under Board precedent to constitute ratification. App. 58a-61a.

The Eleventh Circuit admittedly was applying a substantial and non-frivolous standard of review. But the ILA made the same legal arguments to the Eleventh Circuit which it later made to the D.C. Circuit, and the Eleventh Circuit clearly rejected them. The D.C. Circuit recognized that it was in disagreement with the Eleventh Circuit. App. 22a. Thus, this Court is presented with the unusual situation of a conflict between the circuits on the same facts.

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[18] To the extent that the Court of Appeals decision is read to imply that the ILA could not be held responsible for the acts of the Japanese Unions under any theory, it is also at odds with the doctrine of apparent authority as applied by the Board. *See, e.g., 3-E Co.*, 26 F.3d at 4. There was evidence in the record that third parties perceived that the communications were coming from the ILA through the Japanese Unions.

5. This case has far-reaching implications for U.S. trade and labor relations policy beyond the immediate parties. The potential impact of the ILA's alleged loophole in the Act's secondary boycott provisions is evidenced by the support of petitioners below by major business associations.[19] In its communications responding to the ILA's requests, the Japanese Unions noted their longstanding "mutual cooperation in the Pacific Area" with other international unions, including the ILA and the International Longshoremen's and Warehousemen's Union, as well as their mutual membership in the International Transportation Federation. Stip. Facts, Exs. 9, 11. This international cooperation in the shipping industry is not unique.

The AFL-CIO and its member institutions have a substantial network that links them with unions abroad. The AFL-CIO is the U.S. representative of the International Conference of Free Trade Unions ("ICFTU"), a Brussels-based organization with the purpose of promoting cross-border international labor solidarity. The ICFTU represents more than 174 unions in over 120 countries. Matt Krantz, "As Firms Go Abroad, Labor Wonders How to Achieve Global Reach," *Investor's Bus. Daily*, Feb. 26, 1995, at A4. The sheer number of trade unions and related associations throughout the world, whether or not affiliated with the ICFTU, underlines the potentially devastating effect the D.C. Circuit's decision could have on foreign trade. U.S. unions have made abundantly clear that they will not hesitate to use

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[19] The National Association of Manufacturers ("NAM") filed an amicus brief before the NLRB. NAM and the U.S. Chamber of Commerce also sought to file an amicus brief before the D.C. Circuit, to which the ILA consented. Their motion was denied without comment.

these vast numbers to their advantage, thereby transforming domestic disputes into potentially devastating international disputes.[20]

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[20] The Japanese Trade Union Confederation ("RENGO"), the most prominent confederal labor organization in Japan, is the Japanese affiliate of the ICFTU. RENGO has approximately 7.84 million members. RENGO affiliates are active in the work of international trade secretariats, including the International Metalworkers Federation; International Federation of Chemical, Energy and General Workers Unions; International Textile, Garment and Leatherworkers Federation; International Federation of Building and Woodworkers; International Federation of Commercial, Clerical and Technical Employees ("FIET"); and the Public Services International. In addition to RENGO, there are two other large trade union confederations in Japan. Both the National Confederation of Trade Unions ("ZENROREN"), which has a membership of 1.4 million, and the National Trade Union Council ("ZENROKYO"), with a membership of 500,000, are active on the international labor scene. Including RENGO, ZENROREN, and ZENROKYO affiliates, there are over 70,000 trade unions in Japan, with a membership of over 12 million. U.S. Dep't Labor, *Foreign Labor Trends: Japan*, 14, 18 (1994-95).

Organized labor in the U.K. is represented on policy and political issues by the Trade Union Congress ("TUC"), which is affiliated not only with the ICFTU, but also with the European Trade Union Confederation, the Commonwealth Trade Union Council, and the Trade Union Advisory Committee of the OECD. In early 1994 there were 68 trade union affiliates to the TUC, representing 7,647,443 members in the U.K. In addition to the TUC affiliates, there were 219 other individual trade unions registered with the British Government. U.S. Dep't Labor, *Foreign Labor Trends: United Kingdom*, 6-7 (1994-95).

In Canada -- possibly the largest market for U.S. exports -- there are over 4 million union members belonging to over 900 unions. A unique feature of the Canadian labor environment is the coexistence of international unions, with affiliates in both Canada and the U.S., and national unions comprised solely of Canadian members. U.S. Dep't Labor, *Foreign Labor Trends: Canada*, 10-11, 15 (1994-95). In

American economic growth and the U.S. trade balance are heavily dependent upon expanding American exports. The foreign exports of U.S. companies amount to more than $754 billion.[21] U.S.-based companies have foreign affiliates and subsidiaries that account for more than $5 trillion in sales.[22] The Board noted that developments in telecommunications mean that international trade is being conducted through instantaneous communications. The fax machine figured prominently in the events in this case, and events overseas had immediate impacts on U.S. and international trade and commerce. The Board stated as follows:

> In an increasingly global economy, the opportunities abound for U.S. unions to initiate harmful secondary activities by unions representing employees of the foreign trade partner. Permitting U.S. unions to escape responsibility purely on geographical grounds for the economic harm they unleash subverts the purpose of the Act.

App. 37a-38a.

The ILA's scheme to circumvent the secondary boycott laws is not an isolated example. Labor unions are

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Germany there are over 13 million union members, more than 11 million of whom are affiliated with the German Trade Union Federation. U.S. Dep't Labor, *Foreign Labor Trends: Germany*, 26-27 (1992-93).

[21] "U.S. Exports and Imports," 116 *Bus. Ann.* 28 (June 1995).

[22] Raymond J. Mataloni, Jr., "U.S. Multinational Companies: Operations in 1993," *Surv. of Current Bus.* 32 (June 1995).

increasingly coordinating with their foreign counterparts to conduct "global corporate campaigns against recalcitrant corporations."[23] The D.C. Circuit's decision would add the new weapon of threats of work stoppages against neutrals.[24]

The Court of Appeals suggested that in future cases unions could seek aid from their foreign counterparts without

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[23] *See, e.g.*, Daily Lab. Rep. (BNA), Aug. 9, 1990, at A-7. One of the most telling examples of the ever-increasing international coordination of labor unions is the cooperation between the United Steelworkers of America and Japanese unions in the ongoing labor dispute between the Steelworkers and Bridgestone/Firestone. The Steelworkers not only have initiated a worldwide boycott of Bridgestone/Firestone tires, but have also carried the dispute to Japan, home of Bridgestone Corp., Bridgestone/Firestone's parent company. A former United Rubber Workers' president has described the fight in Japan as an integral part of the dispute. Bruce Meyer, "URW Union Merger Heats Up BFS Battle," *Tire Bus.*, July 24, 1995, at 3.

Worldwide corporate campaigns are increasing with alarming frequency and effect. For example, FIET recently supported a worldwide campaign against the American-based multinational Toys 'R' Us, which culminated in a boycott of the company in Sweden. Unable to withstand the pressure, the company has given in to union demands. "Trade Unions Call for Social Dimension in New World Economic Order," *European Social Policy*, Sept. 14, 1995. One recent conference of union officers on the future of labor urged the AFL-CIO to "coordinate with unions abroad for mass picketing to shut down production facilities abroad" in connection with longstanding labor disputes. "Union Members Rally Behind Decatur Workers," 149 Lab. Rel. Rep. (BNA) 315 (July 3, 1995).

[24] As the ILA and its amici noted below, in most other nations secondary boycotts are lawful. Foreign neutrals and U.S. neutrals doing business abroad would have no remedy against the foreign union that threatens or induces a work stoppage, or engages in other coercive behavior.

expressly soliciting such assistance, as the ILA did here. App. 22a. But there is a critical difference between suggesting that foreign unions give support, and (1) making specific requests that those foreign unions threaten and coerce neutrals with work stoppages; (2) providing detailed active encouragement and aid; (3) expressly agreeing to pressure neutrals through job actions in the U.S. and abroad; and (4) expressly ratifying threats made on behalf of the U.S. union. The latter actions will almost certainly produce results.

Moreover, the Board is well suited to look beyond a union's or employer's surface disclaimer of responsibility for the acts of others. In the context of secondary boycotts and other illegal conduct, the Board, consistent with common-law agency principles, has imposed on employers and unions the obligation affirmatively to disavow illegal conduct which was professed to be taken on their behalf.

The Court of Appeals' decision is not limited to the scenario of foreign unions. It would allow unions in the United States to make unlawful threats through the intermediary of unions that are not part of the same international. Unions could instigate, support, and encourage boycotts of neutrals, participate in boycotts (*e.g.*, by identifying targets), and condone and ratify those threats. While the Board may be able to take action against the union that actually threatens neutrals, the union that authorized, instigated, encouraged, supported, and ratified those threats, and that is the direct beneficiary of those threats, would escape liability -- and would have no exposure for the

ensuing damages.[25] The D.C. Circuit's decision could have an even greater impact on domestic labor disputes if the requirement of formal affiliation or control were applied to unions who operate through other intermediaries, such as non-profit associations supported by the AFL-CIO.[26] If such "independent" entities were to threaten or coerce neutrals at the request of a U.S. union, the Board could not reach their conduct (because they are not labor organizations). Under the D.C. Circuit's approach, the requesting union escapes liability because there is no legal affiliation. The impact of this decision on domestic "corporate campaigns" will be tremendous.

6. Congress gave the Board the "primary responsibility for developing and applying national labor policy." *Curtin Matheson*, 494 U.S. at 786; *see Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Where the Act does not speak directly to an issue, the Court gives "considerable deference" to the Board's interpretation and will uphold it if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at

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[25] Persons injured in their business or property by a secondary boycott have a private right of action for damages. 29 U.S.C. § 187.

[26] Two examples are the AFL-CIO's Committee on Political Education and one of the amici below, the International Labor Rights Education and Research Fund ("ILRERF"). Although not formally affiliated, ILRERF often works closely with the AFL-CIO. *See, e.g.*, "Mexican Government and Sony Blasted for Violating Workers' Rights," *PR Newswire*, Nov. 9, 1995; "Sony Charged Under NAFTA," *Consumer Elecs.*, Vol. 34, No. 34, Aug. 22, 1994.

786-87. *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

In this case the Board applied agency principles in the context of holding one person responsible for unfair labor practices for the acts of another, an issue on which other circuits accord considerable deference. The Board applied these principles in the unique context of the Act's broad secondary boycott provisions. The Board's conclusions that the ILA authorized and ratified the conduct of the Japanese Unions, that this is sufficient as a matter of law to impose responsibility on the ILA for the acts of the Japanese Unions, and that Congress did not intend to leave an enormous loophole in the Act's secondary boycott provisions, are rational and consistent with the purposes of the Act. The D.C. Circuit's conclusions are in conflict with the decision of the Eleventh Circuit and the circuits that have more liberally applied agency principles under the Act.

CONCLUSION

For each of the reasons above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Canaveral Port Authority, et al., Intervenors.

No. 93-1812.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 11, 1995.
Decided June 6, 1995.

Rehearing and Suggestions for Rehearing In Banc Denied Aug. 30, 1995.

Labor union for longshore workers petitioned for review of National Labor Relations Board (NLRB) decision that it committed unfair labor practice by allegedly establishing secondary boycott through Japanese unions. The Court of Appeals, Harry T. Edwards, Chief Judge, held that union did not violate prohibition against secondary boycotts under National Labor Relations Act (NLRA) by seeking support of independent Japanese unions in labor dispute with nonunion employers in United States.

Petition for review granted; case remanded.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Ernest L. Mathews, Jr., New York City, argued the cause for petitioner. With him on the briefs was Maura R. Cahill, New York City.

Robert J. Englehart, Atty., N.L.R.B., Washington, DC, argued the cause for respondent. With him on the briefs were Linda R. Sher, Acting Associate Gen. Counsel, Aileen A. Armstrong, Deputy Associate Gen. Counsel, and Frederick Havard, Supervisory Atty., Washington, DC. Howard E. Perlstein, Deputy Asst. Gen. Counsel, and John H. Fawley, Atty., Washington, DC, entered appearances.

Robert L. Duston, Washington, DC, argued the cause and filed the brief, for intervenor Canaveral Port Authority.

Betty S. Murphy, Washington, DC, argued the cause for intervenor Coastal Stevedoring Co., et al. With her on the joint brief were David A. Grant and Robert L. Duston, Washington, DC.

Before: EDWARDS, Chief Judge, WALD and BUCKLEY, Circuit Judges.

HARRY T. EDWARDS, Chief Judge:

This case requires us to decide whether a domestic labor union commits an unfair labor practice under the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § *151 et seq.* (1988), by seeking the support of Japanese unions in connection with labor disputes involving nonunion employers in the United States. Petitioner International Longshoremen's Association ("ILA") seeks review of a decision of the National Labor Relations

Board ("NLRB" or "Board") holding that the ILA violated section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), by establishing a secondary boycott through the actions of its putative agents, the Japanese unions. Because we hold that the Board erred in attributing the actions of the Japanese unions to the ILA, we grant the petition for review and remand the case to the Board.

In 1947, Congress amended the NLRA with the enactment of the Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) ("LMRA"). A principal provision of the LMRA was the section 8(b)(4) proscription of "secondary boycotts"-- a practice aptly described as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A." FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930) (footnote omitted). As this description implies, secondary boycotts embroil *neutral* parties in disputes between employees and their employers, and it is for this reason that Congress has condemned them. *See International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225, 102 S.Ct. 1656, 1664, 72 L.Ed.2d 21 (1982) (stating that Congress drafted section 8(b)(4) "to protect neutral parties, the helpless victims of quarrels that do not concern them at all") (internal quotations omitted). However, in drafting section 8(b)(4), Congress did not create a "sweeping prohibition" on all forms of secondary boycotts. *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 98, 78 S.Ct. 1011, 1015, 2 L.Ed.2d 1186 (1958). Rather, the provision "describes and condemns specific union conduct directed to specific objectives." *Id.* Thus, section 8(b)(4)(i) specifically targets union actions to engage in, or induce or encourage others employed in commerce to engage in, a strike or refusal to work on goods, *see* 29 U.S.C. § 158(b)(4)(i), and section 8(b)(4)(ii) prohibits union actions to threaten or coerce persons engaged in commerce, *see id.*, § 158(b)(4)(ii), where in either case the object of such action is to force a person to cease using or otherwise dealing in the products

of another, *see id.* § 158(b)(4)(B). In this case, the ILA did neither.

The undisputed facts reveal that the ILA merely requested assistance from Japanese labor unions in its dispute with two nonunion stevedoring companies engaged in Florida's citrus fruit export trade. In response, the Japanese unions gave notice that their members would refuse to unload any fruit in Japan that had been loaded in Florida by nonunion workers. As a consequence of this threat, all Florida-Japan citrus shipments were redirected to new ports of embarkment during the 1990-1991 export season. The parties adversely affected by these actions -- the two stevedoring companies and one neutral party -- filed unfair labor practice charges against the ILA.

Upon reviewing the unfair labor practice charges, the Board held that the ILA had violated the prohibition against secondary boycotts. In reaching this conclusion, however, the Board could not rely on section 8(b)(4)(i), for, although the ILA arguably induced or encouraged other employees to refuse to handle goods, the employees to whom the ILA's entreaties were addressed were Japanese longshoremen, who are not employed by a person "engaged in commerce" as the Act requires. 29 U.S.C. § 158(b)(4)(i). Nor could the Board find that the ILA's actions, standing alone, fell within the scope of section 8(b)(4)(ii), because the Japanese unions, not the ILA, issued the alleged threats that created the boycott. Nevertheless, the Board held that the ILA's actions fell within the scope of section 8(b)(4)(ii) pursuant to a theory of agency law. Under this theory, the Board held that the Japanese unions acted as the agents of the ILA merely because the ILA requested the Japanese unions' actions and benefited from the results of those actions.

In its petition for review, the ILA claims that the Board's agency theory is untenable. We agree. Not only is the Board's

theory completely without support in nearly 50 years of NLRB and judicial precedent interpreting the secondary boycott provision of the NLRA, but it flies in the face of the common law agency principles that Congress sought to incorporate into the Act. Put simply, the ILA and the Japanese unions were completely independent entities; neither exercised any control over the other. If they were bound together at all, it was by a spirit of labor solidarity, but such a spiritual link is too frail to render one union the agent of another. Thus, we reject the Board's theory and remand the case for further consideration.

I. BACKGROUND

This case arises from a labor dispute in the Florida citrus export industry. Japan is a major importer of Florida citrus fruit, and, prior to the events at issue in this case, Florida exporters had shipped fruit to Japan from Fort Pierce and Port Canaveral for several years pursuant to agreements between American exporters and Japanese importers. In the shipping process, American stevedores load the fruit on ships bound for Japan, where the fruit is unloaded by Japanese stevedores. Coastal Stevedoring Co. ("Coastal"), a nonunion company, is the sole stevedoring company in Fort Pierce. Port Canaveral Stevedoring, Ltd. ("Canaveral"), also a nonunion company, conducts business from Port Canaveral, which is operated by a Florida state entity, the Canaveral Port Authority. The ILA has been engaged in labor disputes with Coastal and Canaveral regarding those companies' failures to hire union-represented employees.

Before the 1990-91 citrus export season, ILA representatives visited Japan and met with representatives of several Japanese unions to express concern that Japanese importers were using the services of nonunion stevedores at Port Canaveral and Fort Pierce, and to request assistance in their ongoing dispute with nonunion companies. In response, the Japanese unions asked numerous

stevedoring companies, citrus importers, and shipping companies to ensure that all citrus fruit they imported from Florida was loaded by union workers. Further, the Japanese unions warned that they would refuse to unload any fruit loaded by nonunion workers.

In a letter to the Japanese dockworkers' unions dated October 4, 1990, ILA President John Bowers stated that the ILA was planning to picket nonunion stevedoring companies at Fort Pierce and Port Canaveral, and asked for the support of the Japanese unions. Bowers closed the letter by stating, "Your further support in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the [ILA] and organized labor in the United States which supports our effort," Letter from John Bowers to Toshio Kamezaki (Oct. 4, 1990), *reprinted in* Joint Appendix ("J.A.") 64. The Japanese unions circulated copies of Bowers's letter to various citrus importers, exporters, and shipping companies. As a result, Japanese importers expressed concern to Florida exporters that citrus fruit loaded by nonunion workers would not be unloaded by Japanese longshoremen.

By late October 1990, after having failed to obtain assurances that Japanese dockworkers would unload fruit loaded by nonunion workers, one Japanese importer, Sumisho Fruits and Vegetables Co., and its carrier, Cool Carriers, Inc., directed the ship *Bagno El Triunfo* to go to Tampa for loading by union stevedores, instead of to Fort Pierce as originally scheduled. By letter dated November 6, 1990, ILA Special Consultant Ernest S. Lee wrote to the Japanese dockworkers' unions to state that the diversion of the ship was "a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts. . . .Thank you." Letter from Ernest S. Lee to Toshio Kamezaki (Nov. 6, 1990), *reprinted in* J.A. 79. In the letter, Lee also advised that "[y]our continued efforts on our behalf will be

most appreciated." *Id.* Following the lead of Sumisho Fruits and Vegetables, several Japanese importers during December 1990 informed United States exporters that their ships would be loaded at Tampa instead of Port Canaveral because of the threat by Japanese unions. Ultimately, the Japanese unions' actions caused all citrus exports from Florida to Japan during the 1990-91 season to be shipped from Tampa, and none to be shipped from Fort Pierce or Port Canaveral.

Meanwhile, in November and December 1990, Coastal, Canaveral, and the Canaveral Port Authority all filed unfair labor practice charges against the ILA. Subsequently, on June 14, 1991, the NLRB sought an injunction to prohibit the ILA from threatening persons neutral to its labor dispute with Coastal and Canaveral, and to require the union to repudiate its written solicitation of aid from the Japanese unions. The United States District Court for the Middle District of Florida granted the injunction and the Eleventh Circuit affirmed. *See Dowd v. ILA*, 781 F.Supp. 1565 (M.D.Fla.1991), *aff'd*, 975 F.2d 779 (11th Cir. 1992). In its decision, the Eleventh Circuit held that the Board had demonstrated reasonable cause to believe that the ILA had violated NLRA section 8(b)(4)(ii)(B) by articulating "a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese unions to ILA." 975 F.2d at 784. Specifically, although acknowledging that the ILA had no right of control over the Japanese unions as normally is required to create an agency relationship, the Eleventh Circuit concluded that,

> [u]nder the liberal application of agency concepts appropriate in the labor context, a contractual right to control and direct the performance of another is not required to impose responsibility under section 8(b) where an employer or union has encouraged or requested another to engage in unfair labor practices on its behalf.

Id. at 785 (footnote omitted). The court also agreed with the Board that the ILA was responsible for the Japanese unions' actions under theories of ratification and joint venture. *Id.* at 785-86. Finally, in response to the ILA's argument that application of the NLRA to acts taken in Japan constituted an impermissible extraterritorial extension of domestic federal law, the Eleventh Circuit stated that "the NLRA reaches the conduct of an American union which solicits a foreign entity to apply pressure overseas with the intent and effect of gaining an unlawful advantage in a primary labor dispute in the United States by coercing American employers." *Id.* at 788.

With the injunction in place, the parties waived a hearing and an administrative law judge's decision and submitted the case directly to the Board based on stipulated facts. On November 24, 1993, the Board held that the ILA had violated NLRA section 8(b)(4)(ii)(B) by threatening, coercing, or restraining neutral persons engaged in commerce in the citrus import and export industry with the object of forcing or requiring them to cease doing business with Coastal, Canaveral, and other nonunion stevedoring companies in Fort Pierce and Port Canaveral. *See ILA*, 313 N.L.R.B. 412, 1993 WL 497343 (1993). In so doing, a majority of the Board concluded that, although the threats in this case actually emanated from the Japanese unions, the ILA was responsible for those threats under an agency law theory. In reaching this conclusion, the Board relied upon its earlier decision in *United Pipefitters Local 280 (Aero Plumbing Co.)*, 184 N.L.R.B. 398 (1970). In that case, Local 280 sought an agreement with Aero Plumbing Co. ("Aero"), a plumbing contractor, and, to that end, alerted another local, Local 78, that Aero would be working within its jurisdiction, and asked Local 78 to attempt to persuade the contractor to sign the agreement. When, in response, Local 78 picketed Aero's job site, the Board held Local 280 responsible for the resulting unfair labor practice. In the decision below, the Board reasoned that the conduct of the

ILA in this case "is virtually identical to that of the Local 280 in *Aero Plumbing* with respect to informing the other union of its difficulties with an employer, requesting certain supportive action by the other union, and taking full advantage of the benefits of the other union's action." 313 N.L.R.B. at 416. Accordingly, the Board held that, as in *Aero Plumbing*, the ILA's conduct here "amounted to authorization and ratification" of the Japanese unions' actions. *Id.* The Board also found policy considerations to support an agency theory in this case, despite the international character of the underlying dispute, because "[p]ermitting U.S. unions to escape responsibility purely on geographical grounds for the economic harm they unleash subverts the purpose of the [NLRA]." *Id.* Finally, the Board agreed with the Eleventh Circuit's conclusion that the Board had jurisdiction over this case under the NLRA, notwithstanding that all illegal conduct occurred in Japan, because the assertion of such jurisdiction did not interfere with Japanese law. *See id.* at 417-18. Thus, the Board ordered the ILA to cease and desist from requesting assistance from the Japanese unions, to repudiate its earlier requests, and to post a notice in its offices of the unfair labor practice it had committed.

II. ANALYSIS

In its petition for review, the ILA presents a two-pronged attack on the Board's decision. First, the ILA argues that the Board's action constituted an impermissible extraterritorial application of the NLRA, because the threats giving rise to the unfair labor practice charge in this case occurred in Japan. Second, it contends that the Board erred in holding that the Japanese unions were acting as the agents of the ILA when they threatened to boycott products loaded by nonunion labor.

As an initial matter, we note that the Board in its decision below stated explicitly that "[n]o direct conduct by the (ILA] is

alleged to be unlawful in this case. All the allegedly unlawful acts were committed solely by the Japanese Unions." *ILA*, 313 N.L.R.B. at 414, 1993 WL 497343. Therefore, because the Board's decision appears to focus almost entirely on conduct taken outside the United States, a substantial question is raised regarding the extraterritorial reach of the NLRA. However, we need not resolve that issue to dispose of this case. We are required to address the question whether the NLRA reaches acts taken in Japan by Japanese unions only if we first agree with the Board that the Japanese unions served as the agents of the ILA in undertaking the conduct at issue, for only then are actions occurring on foreign soil potentially brought within the purview of the Act. We will indulge an assumption that the Board has applied the NLRA only domestically in this case, for our conclusion with respect to the Board's agency theory fully resolves the dispute between the parties.

The Board itself acknowledges that its agency law theory is the linchpin of its unfair labor practice finding. The Board held,[1] and its counsel conceded at oral argument, that, standing alone, the ILA's request for assistance from Japanese unions in its ongoing dispute with nonunion Florida stevedoring companies was not unlawful under the NLRA. An examination of the plain language of the statute demonstrates the propriety of the Board's

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[1] In noting that its remedial order in this case had no direct impact on the Japanese unions, the Board explained that "[t]his is not to say that the [ILA's] request, standing alone, was the unfair labor practice. As explained above, the unfair labor practice was the conduct of the Japanese Unions, for which the Respondent [ILA] is responsible." *Id.* at 418 n. 17, 1993 WL 497343.

concession. NLRA section 8(b)(4)(B) makes it an unfair labor practice

> for a labor organization or its agents . . . (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is --
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> * * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

29 U.S.C. § 158(b)(4)(B). Thus, section 8(b)(4)(i)(B) prohibits a union from inducing or encouraging other employees to refuse to handle goods with an object of forcing a person to cease doing business with another – *i.e.*, it prohibits conduct much like that undertaken by the ILA here. However, subsection (i) prohibits such conduct only where the employees who received the inducements or encouragement were themselves employed by a "person engaged in commerce or in an industry affecting commerce." *Id.* § 158(b)(4)(i). Here, of course, the recipients of the ILA's inducements were employed by Japanese stevedoring companies, and it is well-established that foreign workers in foreign countries are not engaged commerce within the meaning

of the Act.[2] *See Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144, 77 S.Ct. 699, 702, 1 L.Ed.2d 709 (1957) (noting NLRA's focus on "the *American* workingman" and describing the "boundaries of the Act as including only the workingmen of our own country and its possessions") (internal quotations omitted); *see also Incres S.S. Co. v. International Maritime Workers Union*, 372 U.S. 24, 27, 83 S.Ct. 611, 613, 9 L.Ed.2d 557 (1963) ("The Board's jurisdiction to prevent unfair labor practices ... is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of [the NLRA]."). Accordingly, the ILA's inducements were not among those targeted by section 8(b)(4)(i)(B).

The Board's counsel also conceded at oral argument that, had the Japanese unions acted without any request for help from the ILA, their acts would have been beyond the scope of the NLRA. This concession also was well-founded. Although NLRA section

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[2] The NLRA defines the term "commerce" to mean

> trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. § 152(6). It also defines the term "affecting commerce" to mean

> in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Id. § 152(7).

8(b)(4)(ii)(B) by its terms prohibits a labor organization from threatening or coercing a person to boycott the products of a third party, the threats in this case issued from Japanese unions operating in Japan. Accordingly, any unfair labor practice charge against the Japanese unions under section 8(b)(4)(ii)(B) would have required a purely extraterritory application of the NLRA – an application that we could condone only upon finding "the affirmative intention of the Congress clearly expressed." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting *Benz*, 353 U.S. at 147, 77 S.Ct. at 704). However, the Supreme Court in a long line of cases has held that Congress never intended the Act to apply to labor disputes involving foreign workers operating under foreign laws on foreign-flag ships, *see, e.g., American Radio Ass'n v. Mobile S.S. Ass'n Inc.*, 419 U.S. 215, 221-25, 95 S.Ct. 409, 413-15, 42 L.Ed.2d 399 (1974); *Windward Shipping v. American Radio Ass'n*, 415 U.S. 104, 113-15, 94 S.Ct. 959, 964-65, 39 L.Ed.2d 195 (1974); *Incres S.S. Co.*, 372 U.S. at 26-28, 83 S.Ct. at 612-13; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-22, 83 S.Ct. 671, 676-78, 9 L.Ed.2d 547 (1963); *Benz*, 353 U.S. at 143-44, 77 S.Ct. at 702, and we certainly can conceive of no basis for a different result where the relevant dispute occurs on foreign soil, *cf. Labor Union of Pico Korea v. Pico Prods., Inc.*, 968 F.2d 191, 194-96 (2d Cir.) (holding section 301 of LMRA inapplicable to labor contract executed between South Korean union and wholly-owned South Korean subsidiary of American corporation), *cert. denied*, ___ U.S. ___, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992); *RCA OMS, Inc.*, 202 N.L.R.B. 228, 1973 WL 12138 (1973) (holding NLRA inapplicable to employees located in Greenland). Of course, if the ILA itself had issued the threats involved in this case, the Board could have taken action against that union under section 8(b)(4)(ii)(B), for the ILA is a domestic entity. However, the undisputed facts present no basis for such a charge; the Japanese unions assisted the ILA not because they were coerced, but

because they sympathized with the ILA's objectives. Thus, as the Board has acknowledged, this case gives rise to an unfair labor practice under NLRA section 8(b)(4)(ii)(B) only if the threats issued by the Japanese unions somehow may be attributed to the ILA. Accordingly, we turn to the parties' agency law arguments.

In considering questions of agency under the NLRA, we must construe section 2(13), which provides that, "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13). Congress added this provision to the Act as part of the LMRA, and the legislative history of that statute makes clear that it was designed to render "both employers and labor organizations . . . responsible for the acts of their agents in accordance with the ordinary common law rules of agency.[3] H.R.CONF.REP. NO. 510, 80th Cong., 1st Sess. 36 (1947) U.S.CODE CONG.SERV. 1947, pp. 1135, 1142; *see also* 93 CONG.REC. 6859 (1947) (statement of Sen. Taft) (stating agreement of conference committee that "the ordinary law of agency should apply to

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[3] As the legislative history demonstrates, *see* 93 CONG.REC. 6859 (statement of Sen. Taft), the 80th Congress drafted the specific language of NLRA section 2(13), providing that neither authorization nor ratification shall be dispositive of agency issues, to overrule the Supreme Court's then-recent decision in *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947). The Court in that case held that labor unions and their members could be held responsible for the illegal actions of individual officers or members committed during labor disputes only if they "actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration." *Id.* at 403, 67 S.Ct. at 779 (footnote omitted). As Justice Frankfurter noted in dissent, the majority's decision imposed evidentiary burdens that exceeded those established by the common law agency. *See id.* at 417-20, 67 S.Ct. at 786-88 (Frankfurter, J., dissenting). The Congress that passed the LMRA therefore designed section 2(13) to "restore[] the law of agency as it has been developed at common law." 93 CONG.REC. 6859 (statement of Sen. Taft).

employer and union representatives"); *Local 1814, ILA v. NLRB*, 735 F.2d 1384,1394 (D.C.Cir.) ("Beyond doubt, the legislative intent of [section 2(13)] was to make the ordinary law of agency applicable to the attribution of individual acts to both employers and unions."), cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984).

For this reason, we accord only limited deference to the Board's agency law analysis. Our cases establish that, when confronted with a question regarding the meaning of an NLRA provision incorporating common law agency principles, we need not defer to the agency's judgment as we normally might under the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C.Cir. 1990) ("Deference under the *Chevron* doctrine . . . does not apply here because of the 1947 congressional direction that the Board and the courts apply the common law of agency to the issue.") (footnote omitted); *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598 (D.C.Cir.1989) (stating that "the court is not to extend any great amount of deference" to NLRB's interpretation of statutory provision incorporating common law of agency) (internal quotations omitted).[4] Nevertheless, because even common law agency

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[4] As the court noted in *Aurora Packing Co.*,

> *Chevron* presumes that Congress delegated primarily to executive branch agencies the interpretation of ambiguous [statutory] terms . . . in part because of an agency's expertise, and in part because of the policy role inherent in that function – which the Court thought Congress prefers the agencies rather than the nonelected judiciary to perform. *See* 467 U.S. at 843-44[, 104 S.Ct. at 2781-82]. When Congress indicated that it wanted the judge-made common law of agency to govern the construction of [a statutory provision], it rejected the basis of these presumptions.

questions are "permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute," *North Am. Van Lines, Inc.*, 869 F.2d at 599, our standard of review is not *de novo*. Rather, in a situation of this sort, we must give due weight to the Board's judgment to the extent that "it made a choice between two fairly conflicting views." *Id.* (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968)).[5]

Applying that standard here, we cannot say that the Board's decision represented "a choice between two fairly conflicting views," for, in our view, the Japanese unions were in no sense the agents of the ILA. It is a fundamental principle of hornbook agency law that an agency relationship arises only where the principal "has the right to control the conduct of the agent with respect to matters entrusted to him." RESTATEMENT (SECOND) OF AGENCY § 14 (1958); accord *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 219 (6th Cir.1992); *United Packinghouse Workers v. Maurer-Neuer, Inc.*, 272 F.2d 647, 648 (10th Cir.1959), *cert. denied*, 362 U.S. 904, 80 S.Ct. 611, 4 L.Ed.2d

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904 F.2d at 76 n. 1 (citation omitted); *see also NLRB v. United Ins. Co.*, 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968) (stating that "a determination of pure agency law involve[s] no special administrative expertise that a court does not possess").

[5] The result we reach in this case would be the same even if the *Chevron* doctrine were fully applicable. For one thing, there is no doubt that the Board's decision is not supported by the plain meaning of section 2(13). *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). And, even assuming, *arguendo*, that section 2(13) is ambiguous in its definition of "agent," we would reject the Board's interpretation as wholly unreasonable under well-established principles of agency law. *See id.* at 844, 104 S.Ct. at 2782 (stating that court must defer to agency's "reasonable interpretation" of ambiguous language in statute it administers).

555 (1960); *see also, e.g., Edwards v. John Hancock Mut. Life Ins. Co.*, 973 F.2d 1027, 1031-33 (1st Cir.1992) (finding that trustees were agents of insurance company where deeds of trust empowered company to control conduct of trustees with respect to property at issue). Indeed, as to this requirement, the Restatement's reporter comments that, "[i]f the existence of an agency relation is not otherwise clearly shown, as where the issue is whether . . . an agency has been created, the fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relation is not that of agency." RESTATEMENT (SECOND) OF AGENCY § 14 cmt. b. Here, the ILA exercised no control over the conduct of the Japanese unions. To the contrary, the ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the goals of organized labor worldwide. We discern nothing in the law of agency to support a theory transforming one union into the agent of another based upon the spirit of labor solidarity alone.

Certainly, none of the cases cited by the Board supports such a theory. Neither the Board nor any of its supporting intervenors has cited a single case involving two unions situated similarly to those here in which one has been held the agent of the other. The Board in its decision below relied heavily upon its reasoning in the previously discussed *Aero Plumbing* case, in which it attributed the actions of one local union to another. *See* 184 N.L.R.B. at 398. We note initially that the attribution theory adopted by the Board in that case never has received judicial approval.[6] Even

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[6] Although the labor dispute at issue in *Aero Plumbing* eventually reached the Ninth Circuit, the court did not review the Board's attribution theory, but rather considered only the enforceability of a labor contract containing provisions obtained by the union through unfair labor practices. *See NLRB v. Southern California Pipe Trades Dist. Council No. 16*, 449 F.2d 668 (9th Cir. 1971).

assuming its validity, however, we find *Aero Plumbing* readily distinguishable. The two unions involved in that case were sister locals of a single parent union operating under the same collective bargaining agreement.[7] Therefore, the Board's decision in *Aero Plumbing* may be viewed as no more than a particularized application in the labor context of the common law principle that one agent is liable for the tortious actions of another if he or she directs such actions. *See* RESTATEMENT (SECOND) OF AGENCY § 358(l). No matter how interpreted, however, *Aero Plumbing* involved a relationship between two unions bound by a formal affiliation and a common agreement, and, thus, the relationship was far closer than that existing between the Japanese unions and the ILA. Accordingly, it provides no support for the Board's finding of an agency relationship in this case.[8]

We also are unpersuaded by the Board's reliance on language from *Local 1814, ILA v. NLRB*, 735 F.2d at 1384. In that case, we said that

> [t]ransplantation of ordinary agency law, which arises out of ordinary contract and tort disputes, into the NLRA context necessarily requires sensitivity to the particular circumstances of industrial labor relations. Courts have concluded that

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[7] Both were affiliated with the Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. *See* 184 N.L.R.B. at 398-99, 400.

[8] The same is true of another case cited by the Board in its decision below, *ILA (Shipside Packing Co.)*, 227 N.L.R.B. 659 (1976). In that case, the Board held ILA Local 333 responsible for the unlawful activities of ILA Local 953, stating that Local 333 "was aware of the activities, knew they were on behalf of employees it represents, and, therefore, is responsible for the activities found illegal herein. *Id.* at 659 n.1. As the foregoing recitation of facts suggests, both Local 333 and Local 953 were sister locals of the ILA.

> under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented.

Id. at 1394. However, to say that we must construe agency principles expansively under the NLRA is not to say that we may abandon the core principles of agency law. Indeed, in *Local 1814* itself, we applied principles derived from the "scope of employment" branch of agency law to determine that a union officer acted as an agent of Local 1814 when he entered into an illegal kickback agreement. 735 F.2d at 1394-95. Although we inferred that the officer was authorized by the union to enter the illegal scheme based on his "actual authority over representational matters in general, together with the substantial benefits received by Local 1814 as a result [of] the entire agreement of which the kickback arrangement was an integral part," 735 F.2d at 1397, we did not discard the basic agency law rule that a principal is liable for only those acts of its agent committed within the scope of employment, nor could we have done so without also discarding our duty to apply the NLRA consistently with the intent of Congress.

Equally inapposite are cases in which courts have held employers responsible for the actions of employees and others conducting anti-union campaigns. Chief among such cases are the Supreme Court's decisions in *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 61 S.Ct. 83, 85 L.Ed. 50 (1940), and *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309 (1941). In the former case, the Court affirmed a Board decision holding an employer responsible for the actions of four senior employees who, in conversations with coworkers during the weeks preceding a plant election pitting one union against another, stressed the employer's preference for one union and suggested that employees siding with that union would receive better treatment – all with the apparent acquiescence of the employer

itself. *See* 311 U.S. at 76-77, 61 S.Ct. at 86-87. Reviewing these circumstances, the Court stated that, "where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates." *Id.* at 80, 61 S.Ct. at 88 (footnote omitted). Similarly, in *H.J. Heinz Co.*, 311 U.S. at 520-21, 61 S.Ct. at 323, the Court attributed to an employer the actions of superintendents and foremen who conducted a zealous anti-union campaign, where the employer failed to disavow their efforts even after receiving a complaint from a union representative. Lower courts have extended the rationale of such cases to hold employers responsible for the actions of even some non-employee third parties. *See, e.g., Cagle's Inc. v. NLRB*, 588 F.2d 943, 947-48 (5th Cir.1979) (holding employer responsible for actions of local chamber of commerce official who campaigned against union and acted as *de facto* intermediary between union committee and employer).

However, as the foregoing description suggests, the holdings of *International Association of Machinists* and its progeny turn upon the reasonable perceptions of those involved in the collective bargaining process. Thus, the courts in those cases held employers liable for the unlawful conduct of third parties when, under all the circumstances, employees *reasonably* could have believed that such third parties were acting for and on behalf of the employer.[9] *See* 311 U.S. at 80, 61 S.Ct. at 88 (attributing

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[9] In this respect, this line of precedent appears to proceed upon a theory similar to the common law agency doctrine of apparent authority, which holds a principal responsible for the acts of an alleged agent where the principal, "by written or spoken words or any other conduct . . . , reasonably interpreted, causes [a] third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." RESTATEMENT (SECOND) OF AGENCY § 27.

acts of employees to employer "where the employees would have just cause to believe" that employer was responsible); *Cagle's, Inc.*, 588 F.2d at 948 ("The record fully supports the Board's finding that [the chamber of commerce official] represented corporate policy in the eyes of union members."). Here, by contrast, nothing in the record suggests that any party perceived the Japanese unions to be the agents of the ILA, nor that such a perception would have been reasonably justified had it arisen. Thus, nothing in this line of precedent supports the theory that one union may become the agent of a second, completely independent union merely by responding to a request for assistance in a labor dispute.

Indeed, at bottom, the Board's theory depends not upon a liberal construction of agency principles, but upon a complete abrogation of such principles. Were we to accept the Board's theory, the notion of "agency" under the NLRA would become a limitless doctrine to be applied wherever it becomes necessary to attribute the actions of one entity to another in order to effectuate what the Board perceives to be the purposes of the Act. This view ignores the fact that Congress in the NLRA enacted specific -- not blanket -- prohibitions on certain conduct, including secondary boycotts. As the Supreme Court has stated, "[w]hatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted." *Local 1976, United Bhd. of Carpenters* 357 U.S. at 98, 78 S.Ct. at 1015. Instead, the NLRA's secondary boycott provision targets specific union conduct by means of carefully circumscribed legislative language, *see id.*, and we would subvert rather than effectuate the statute by allowing the Board to nullify its express limitations through the application of an infinitely malleable agency theory. We are not shaken in this conclusion by the Board's claim that legal principles in the labor arena must expand to address newly emerging

problems on an international scale. If the nation's increasingly global economy requires an expansion of federal labor law, it is for Congress -- not the Board or the federal courts -- to make the necessary changes. *See Arabian American Oil Co.*, 499 U.S. at 259, 111 S.Ct. at 1236 (holding that Title VII does not apply extraterritorially, but noting that "Congress, should it wish to do so, may . . . amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.").

Finally, we observe that, in addition to its other flaws, the agency theory propounded by the Board in this case is impractical. The Board at oral argument acknowledged that the ILA could have evaded an unfair labor practice finding in this case merely by publicizing its labor dispute with Florida stevedoring companies and then disclaiming responsibility for any assistance offered by other unions, for in that case a critical element of the Board's agency theory -- the ILA's request for specific assistance -- would be absent. Moreover, the Board's theory appears to have little application beyond this case. Even were we to uphold the Board's decision, unions in future cases surely could seek aid from their foreign counterparts without expressly soliciting such assistance as the ILA did here.

In sum, we hold that the Board erred in attributing the actions of the Japanese unions to the ILA for the purpose of an unfair labor practice finding under NLRA section 8(b)(4)(ii)(B). In this regard, to the extent that the Eleventh Circuit reached a contrary conclusion, we respectfully disagree. Bereft of its underlying agency theory, the Board's cease and desist order in this case merely prohibits the ILA from requesting assistance from the Japanese unions -- an action that, as we have said, the Board has conceded to be lawful. Thus, we grant the petition for review.

III. CONCLUSION

For the foregoing reasons, this case is remanded to the Board for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

International Longshoremen's Association, AFL-CIO *and* Coastal Stevedoring Company *and* Canaveral Port Authority *and* Port Canaveral Stevedoring, Inc., Patrick T. Lee, W. T. Cox, Jr., Mather Ward, George Scheidler, and Ben Pekin Family Partnership d/b/a Port Canaveral Stevedoring Limited. Cases 12-CC-1226, 12-CC-1227-1, and 12-CC-1227-2

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case poses the question whether the Respondent is responsible, under Section 8(b)(4)(ii)(B), for threats made in Japan by Japanese Unions to neutral persons (exporters, shippers, and importers) who are involved in the Florida-Japan citrus trade. Also raised is the issue of whether the Board has jurisdiction in this case.

The threats were that citrus would not be unloaded in Japan if these neutral persons continued to do business with nonunion stevedoring companies in the United States. The Respondent has a primary dispute with these nonunion companies.

We conclude that the Respondent is responsible for the conduct of the Japanese Unions, and that the Board has jurisdiction

in this case. We hold that the Respondent has violated Section 8(b)(4)(ii)(B) as alleged.[1]

On November 21, 1991, the General Counsel, the Respondent, and the Charging Parties filed a stipulation of facts and a joint motion to transfer proceedings directly to the Board. The parties waived a hearing and the issuance of a decision by an administrative law judge and indicated their desire to submit the case directly to the Board for findings of fact, conclusions of law, and a decision. The parties also agreed that the charges, complaints, answers to complaints, and the stipulation of facts would constitute the entire record before the Board.

On January 27, 1992, the Board issued an order granting the parties' motion, approving the stipulation, and transferring the

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[1] Upon charges filed by Coastal Stevedoring Company (Coastal) on November 27, 1990 (Coastal filed an amended charge on June 3, 1991); by Canaveral Port Authority on November 20, 1990; and by Port Canaveral Stevedoring, Inc., Patrick T. Lee, W.T. Cox, Jr., Mather Ward, George Scheidler, and Ben Pekin Family Partnership d/b/a/ Port Canaveral Stevedoring Limited (Canaveral) on December 5, 1990, the General Counsel of the National Labor Relations Board issued an order consolidating cases, and a consolidated amended complaint and notice of hearing on July 23, 1991. The complaint alleges that the Respondent and the National Council of Dockworkers Unions of Japan, the Japanese Labor Union Association, and the Japan Seaman's Union (Japanese Unions), have been parties to a common plan, scheme, and/or joint venture having the object of forcing neutrals to cease doing business with Coastal, Canaveral, and other nonunion stevedoring companies and/or to alter their business relationships concerning the shipment of citrus fruit from Ft. Pierce and Port Canaveral, Florida, to Japan. The complaint further alleges that the Respondent has violated Sec. 8(b)(4)(ii)(B) of the Act through the conduct of the Japanese Unions which threatened economic harm to neutrals unless the job of loading citrus fruit onto vessels in florida was performed by union labor. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

proceedings to the Board. Thereafter, the General Counsel,[2] the Charging Parties, and the Respondent filed briefs. The National Association of Manufacturers filed a brief as an amicus curiae.

On October 26, 1993, the Board heard oral argument in this case.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Coastal, a Florida corporation with an office and place of business in Ft. Pierce, Florida, is engaged in business as a stevedoring company. During 1990, Coastal performed stevedoring services valued in excess of $50,000 for shipping companies sailing in intercoastal or international waters, which shipping companies annually have a gross volume of business in excess of $500,000. Indian River Citrus Sales, Inc. (IRCS), a Florida corporation with an office and place of business in Wabasso, Florida, is engaged in the business of exporting citrus fruit. During 1990, IRCS sold and shipped from points located in Florida citrus fruit valued in excess of $50,000 directly to points located outside the State of Florida. Canaveral is owned by general partner Port Canaveral Stevedoring, Inc., and limited partners Patrick T. Lee, W. T. Cox Jr., Mather Ward, George Scheidler, and the Ben Pekin Family partnership, doing business

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[2] The General Counsel filed a motion to strike a letter appended to the Respondent's brief and certain factual assertions which, according to the General Counsel, are not a part of the record. The General Counsel's motion to strike the appended letter is granted, as the letter is not part of the record. The other matters which the General Counsel seeks to strike from the Respondent's brief are more in the nature of interpretations of the stipulation than they are additions of facts not contained in the record. We have not relied on these matters in making our decision and we find it unnecessary to strike them.

as and trading under the name of "Port Canaveral Stevedoring Limited." Canaveral maintains an office and place of business at Port Canaveral, Florida, and is engaged in business as a stevedoring company. During 1990, Canaveral performed stevedoring services valued in excess of $50,000 for shipping companies sailing in intercoastal or international waters, which shipping companies annually have a gross volume of business in excess of $500,000. We find that Coastal, IRCS, and Canaveral are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Stipulated Facts*

Japan is a major importer of citrus fruit grown in Florida. For several years, Florida grapefruit has been shipped to Japan from Ft. Pierce and Port Canaveral, Florida, pursuant to agreements between American exporters such as Indian River Citrus Sales (IRCS) and Japanese importers such as Sumisho Fruits and Vegetables Co. (Sumisho). The grapefruit is loaded onto Japan-bound ships by employees of American stevedoring companies and is unloaded in Japan by employees of Japanese stevedoring companies.

Coastal is the only stevedoring company operating at Ft. Pierce. It is a nonunion company. Canaveral is also a nonunion stevedoring company. It performs stevedoring services at Port Canaveral, which is operated by the Canaveral Port Authority, a state port authority which leases space to union and nonunion companies. The Respondent represents employees of certain stevedoring companies, many of which operate out of Tampa, Florida. The Respondent is engaged in a primary labor dispute with Coastal and Canaveral concerning their failure to hire employees represented by a union.

Before the 1990-1991 citrus export season,[3] the Respondent's representatives visited Japan and met with representatives of the Japanese Unions. At these meetings, the Respondent expressed concern about the fact that Japanese importers and shipping companies were using nonunion stevedores at Port Canaveral and Ft. Pierce. The Respondent requested assistance from the Japanese Unions in preventing this use of nonunion stevedores.

The Japanese Unions responded to this request for support by widely disseminating communications to stevedoring companies, citrus importers, and shipping companies, asking that they ensure that citrus fruit is loaded in Florida by stevedoring companies that hired union-represented employees. The Japanese Unions also warned that Japanese dockworkers would not unload fruit loaded in the United States by nonunion labor. Typical of these communications is a letter dated April 5, 1990, written by President Toshio Kamezaki on behalf of the Japanese dockworkers to President Gorman of Florida Transport Systems, Inc. (a nonunion stevedoring company in Ft. Lauderdale, Florida). Kamezaki refers to the fraternal relations that the Japanese Unions have had for many years with the Respondent. He sets forth the request made by the Respondent "for our cooperation," and states:

> Having discussed the matter at our Executive Committee in March, we agreed never to tolerate Japanese importing firms or shipping companies to carry out activities that may lead to the destruction of ILA, and your company to reject talks with ILA on this matter. We have decided to take actions in Japanese ports in full support of ILA.

Kamezaki further states that he will communicate with citrus importers and shipping companies and "will make them sure to

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[3] The season runs from approximately October or November until April or May.

never conclude contracts with stevedoring companies attempting to destroy ILA . . . and that Japanese dockworkers' [sic] unions are ready to boycott [sic] the unloading of the cargo in Japanese ports in the event that early, favorable solution should not be made." (S. Exh. 9.)

In a letter dated October 4, 1990, the Respondent's president, John Bowers, informed Kamezaki that the Respondent was planning to picket nonunion stevedoring companies at Ft. Pierce and Port Canaveral. He stated: "[W]e hope to have your support in a form which will bring this matter to the attention of the Japanese people, your government and the Japanese shippers and importers who are directly and indirectly involved." He ended by stating, "Your further support in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the International Longshoremen's Association and organized labor in the United States which supports our effort." (S. Exh. 14.)

The Japanese Unions circulated copies of the Bowers letter of October 4, 1990, to citrus importers and exporters and to shipping companies. Japanese importers such as Imperial Corporation, Tokyo, expressed concern to Florida exporters (such as IRCS) that citrus which was loaded by nonunion longshoremen in Florida would not be unloaded by Japanese dockworkers.

In late October 1990, after failing to obtain assurances that Japanese dockworkers would unload fruit loaded by nonunion stevedores, Sumisho and its carrier, Cool Carriers (Svenska) AB, directed the ship, *Bagno El Triunfo*, not to go to Ft. Pierce as scheduled but to instead go to the port of Tampa for unloading by longshoremen represented by the Respondent. By letter dated November 6, 1990, the Respondent's special consultant, Ernest Lee, told the National Council of Dockworkers' Unions of Japan that the diversion of the *Bagno El Triunfo* to Tampa was "a direct

result of your very timely and effective notices to relevant parties in Japan of your support for our efforts." Lee added:

> Your continued efforts on our behalf will be most appreciated. Rather than diversions, we would be pleased to see incoming vessels contracting with and employing union stevedores at Port Canaveral and Fort Pierce for their unloading and ours. We believe this can be accomplished. [S. Exh. 26.]

During early December 1990, Japanese importers such as Japan Produce Corp. informed various U.S. exporters, such as Gulf Stream Citrus Sales, that their ships would be loaded at Tampa instead of Port Canaveral because of concern that the Japanese Unions would otherwise refuse to unload the fruit in Japan. The Japanese Unions' threat to support the Respondent by refusing to unload the fruit that had been loaded by nonunion labor caused all the citrus shipments from Florida to Japan during the 1990-1991 export season to be shipped through the port of Tampa where they were loaded by stevedores represented by the Respondent. No ships were scheduled for Port Canaveral or Ft. Pierce during that season for the same reason.

B. *Contentions of the Parties*

The General Counsel argues that the Respondent, in furtherance of its primary dispute with Coastal and Canaveral Stevedoring, pressured participants in the Florida-Japan citrus trade, neutral to the primary dispute, by bringing about a threatened boycott by Japanese Dockworkers of any citrus fruit loaded by the primaries in Florida. The General Counsel contends

that this pressure constitutes a threat within the meaning of Section 8(b)(4)(ii) for an object proscribed by subparagraph (B).[4]

The General Counsel further contends that the Respondent is responsible for the actions of the Japanese Unions under four theories of law; three are grounded in agency law and the fourth is grounded in joint-venture principles. First, the General Counsel contends that the Respondent, by its October 4, 1990 letter requesting that the Japanese Unions refuse to unload citrus fruit loaded by the primaries, authorized the Japanese Unions' subsequent threat to boycott. Second, by its letter of November 6, 1990, thanking the Japanese Unions for their actions and requesting continued assistance, the Respondent ratified those actions. Third, the General Counsel asserts that the Japanese Unions had apparent authority to act for the Respondent. Such authority was created by the Japanese Unions' dissemination of the Respondent's October 4, 1990 letter and by the Respondent's failure to stop or object to the Japanese Unions' course of conduct. Fourth, the General Counsel argues that the Respondent is responsible for the Japanese Unions' conduct because the Respondent and the Japanese Unions acted together in joint venture in pursuit of the common goal of eliminating the use of nonunion stevedores at Port Canaveral and Ft. Pierce, Florida.

Having established, to his satisfaction, that the Respondent was responsible for the conduct of the Japanese Unions, the General Counsel contends that the Board has jurisdiction over the conduct of the Japanese Unions. In this regard, the General

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[4] Sec. 8(b)(4)(ii) provides that:

It shall be an unfair labor practice for a labor organization or its agents--to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is--

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Counsel argues that the conduct was initiated in the United States and was aimed at influencing the Respondent's primary labor dispute in the United States.

The Respondent contends that the conduct of the Japanese unions cannot be attributed to the Respondent on a theory of agency or joint venture. The Respondent asserts that there is no authority for the proposition that the Respondent's request for assistance from the Japanese Unions amounts to an authorization of the Japanese Unions to act for the Respondent. Similarly, there is no authority to support a finding that the Respondent's expression of gratitude to the Japanese Unions for assistance is a ratification of the Japanese Unions' conduct. Further, the Respondent argues that there is not even the appearance that the Japanese Unions were acting pursuant to the authority of the Respondent. Finally, the Respondent argues that its relationship with the Japanese Unions does not meet any of the defining features of joint venture such as control, proprietary interest, or sharing of profits and losses.

The Respondent also contends that the Board does not have jurisdiction over the conduct at issue here because the conduct occurred exclusively outside the territorial boundaries of the United States and was committed solely by foreign entities.

C. *Discussion*

No direct conduct by the Respondent is alleged to be unlawful in this case. All the allegedly unlawful acts were committed solely by the Japanese Unions. The initial question before us, therefore, is whether the Respondent is responsible for the conduct of the Japanese Unions. If responsibility is established and if the conduct falls within the proscriptions of Section 8(b)(4)(ii)(B), then the question remains whether the Board has jurisdiction. For the reasons set forth below, we answer each of these questions in the affirmative. The relationship between the Respondent and the Japanese Unions in this case is such that the former is responsible

for the conduct of the latter. The conduct at issue is of the type proscribed by Section 8(b)(4)(ii)(B). And the Board has jurisdiction to find a violation and to prescribe a remedy for the unlawful conduct.

1. The Japanese Unions acted as agents of the Respondent

The Taft-Hartley amendments of 1947 expressly incorporated the common law of agency into the Act by adding the Section 2(13) definition of agency.[5] In referring to the definition, Senator Taft stated: "This restores the law of agency as it has been developed at common law. . . . The conferees agreed that the ordinary law of agency should apply to employer and union representatives."[6] When applied to labor relations, however, agency principles must be broadly construed in light of the legislative policies embedded in the Act:

> Transplantation of ordinary agency law, which arises out of ordinary contract and tort disputes, into the NLRA context necessarily requires sensitivity to the particular circumstances of industrial labor relations. Courts have concluded that under the NLRA, agency principles must be expansively

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[5] Sec. 2(13) provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[6] 93 Cong. Rec. 6858-59. Senator Taft explained that the definition was added expressly to avoid a Supreme Court interpretation of the Norris-LaGuardia Act which exempted organizations from liability for illegal acts committed in labor disputes unless there was proof of actual instigation, participation or ratification. *Carpenters v. U.S.* 330 U.S. 395 (1947).

construed, including when questions of *union* responsibility are presented.[7]

The first step in our analysis, therefore, must be an examination of "the particular circumstances of industrial labor relations" involved in this case. Beyond question, the Respondent attempted to cause economic pressure to be brought to bear against neutral shippers, importers, and exporters involved in the Florida-Japan citrus trade in order to further the Respondent's primary dispute with nonunion stevedoring companies in Florida. In its brief to the Board and at oral argument, the Respondent admits that it induced the Japanese Unions to engage in a secondary boycott, which boycott clearly would have been in violation of Section 8(b)(4)(ii)(B) had it been conducted by a U.S. union on U.S. territory. The particular labor relations practice at issue here, therefore, involves a classic attempt by a U.S. union to cause secondary pressure to be placed on neutral persons to force those persons to cease doing business with the U.S. employers with whom the Respondent has a primary labor dispute in the United States.

The only aspects of this case which remove it from a textbook scenario of 8(b)(4)(ii)(B) conduct is (1) the involvement of foreign entities and (2) the exertions of economic pressure outside U.S. territory. The Respondent contends that these aspects alone are sufficient to require a different result both in the application of agency principles and in the assertion of jurisdiction. We disagree.

Initially, we think it clear that if the threats at issue here had been made, at the Respondent's request, by a U.S. union in the United States, the Respondent would have been held responsible

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[7] *Longshoremen Local 1814 v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984), cert. denied 469 U.S. 1072 (1984). See also *Machinists v. NLRB*, 311 U.S. 72, 80 (1940); *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 521 (1941).

for the threats. In *Pipefitters Local 280 (Aero Plumbing Co.)*,[8] the Board found authorization and ratification of conduct in circumstances similar to those of the instant case. There, the respondent, Plumbers Local 280 (Local 280), sought an agreement which contained permissive, nonmandatory subjects of bargaining with Aero Plumbing. Aero resisted. When Local 280 discovered that Aero would be working in the jurisdiction of Plumbers Local 78 (Local 78), Local 280 told Local 78 that Aero had not signed a contract with Local 280. It told Local 78 to "be on the lookout, maybe they could get Auckerman [part-owner of Aero] to sign the contract."[9] Five days later, Local 78 picketed the jobsite in Local 78's jurisdiction where Aero was working. The next day the general contractor at the jobsite told Auckerman that if he did not get the pickets off the job, Aero's contract would be canceled. Two days later, Aero signed the contract with Local 280. The judge found no evidence that Local 280 authorized or ratified Local 78's picketing. The judge therefore found that Local 280 was not responsible for that picketing. The Board, however, disagreed. It noted that Local 280 informed Local 78 that Aero would be in its jurisdiction, that Aero had not signed a contract with Local 280, and that Local 78 should try to get Aero "to sign the contract." In these circumstances, the Board concluded that Local 280 was responsible for Local 78's conduct.

Concededly, secondary pressure was not present in *Aero Plumbing*, supra. Instead, the issue was whether the Respondent violated Section 8(b)(1)(B) and (3) by coercing Aero into acceptance of a contract containing nonmandatory subjects of bargaining. The agency principles, however, apply with equal force to cases involving secondary boycotts. In each instance, the question is whether the respondent is responsible for the conduct

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[8] 184 NLRB 398 (1970).

[9] Id. at 398.

of another entity. Applying the *Aero Plumbing* principles to the facts of the instant case, we would find the Respondent responsible for the threats of boycott had those threats been made by a U.S. union in the United States. The Respondent informed the unions of its dispute with nonunion stevedoring companies, and requested assistance from the unions in preventing the use of nonunion stevedores. The unions granted the Respondent's request. Asserting that they were acting on behalf of and in support of the Respondent, the unions threatened various neutral shippers, importers, and exporters with the refusal to unload fruit that had been loaded by nonunion labor. In many instances a copy of the Respondent's request for assistance was enclosed with the unions' threats of boycott. The unions' threats produced results. Ships were diverted from ports using nonunion labor to Tampa, Florida, where they were loaded by stevedores represented by the Respondent. The Respondent did nothing to disavow or halt the unions' threats. To the contrary, the Respondent applauded the unions' "timely and effective action" and requested their continued action on the Respondent's behalf. The Respondent's conduct is virtually identical to that of the Local 280 in *Aero Plumbing* with respect to informing the other union of its difficulties with an employer, requesting certain supportive action by the other union, and taking full advantage of the benefits of the other union's action. These actions amounted to authorization and ratification of conduct in *Aero Plumbing*, supra; they clearly would amount to the same here if all the players were American and if the action had taken place in the United States.[10]

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[10] See also *Longshoremen (Shipside Packing Co.)*, 227 NLRB 659 (1976), where the Board found respondent Local 333 responsible for unlawful conduct of respondent Local 953 even though there was no evidence of Local 333's direct involvement in unlawful conduct. The Board noted that Local 333 was a direct beneficiary of the activity of Local 953, was aware of Local 953's conduct, and made no effort to discourage or disclaim the conduct. The Board concluded that "Respondent Local 333 was aware of the activities, knew they were on behalf of the employees it represents, and, therefore, is responsible for the activities found

The issue, therefore, is whether the application of these principles should bring about a different result solely because the other unions are foreign entities and the threats they made occurred outside of the United States. We think not. We first address the fact that the other unions are foreign entities. In our view, the *identity* of the agent is irrelevant to the issue of agency. That is, if a union (or an employer) acts through the instrumentality of another entity, it makes no difference whether that other entity is domestic or foreign. The essential point is that the union is acting through the instrumentality of another entity. Thus, for example, if the Japanese Unions had acted (on behalf of the Respondent) inside the U.S., the Respondent would be responsible even though its instrumentality was Japanese.

We now consider the fact that the conduct here occurred in a foreign country. Notwithstanding this fact, we believe that a finding of responsibility is warranted. The parties stipulated that Japan is a major importer of citrus fruit grown in Florida. Japanese stevedores and American stevedores are linked together by the Florida-Japan citrus trade. The same fruit is loaded by the Respondent and unloaded by the Japanese Unions. The actions of one have a direct impact on the terms and conditions of employment of the other. If, for example, the Respondent's lawful dispute with the nonunion stevedoring companies resulted in disruption of the loading of fruit in Florida, the Japanese unions would feel the impact in the form of decreased work in Japan. In addition, current telecommunications place all entities involved in the Florida-Japan citrus trade in immediate contact. As Charging Party Coastal stressed at oral argument, the fax machine figured prominently in the events at issue here. Letters from Japan reached American shores in the time that it takes to place a telephone call.

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illegal herein." *Id.* at 659 fn. 1.

In these circumstances, we see little difference between the interactions of the Respondent and the Japanese Unions here and those of one local union requesting and receiving assistance from a separate local in a different geographic area as in *Aero Plumbing*, supra. In each case, the unions are involved in the same type of work. In each case, the unions are separated geographically. In each case, the respondent requested assistance for *its* dispute and received direct benefits from the requested action. Given the trade links and rapid communications, we believe that the fact that the geographic separation in this case involves separate countries rather than separate counties is not of compelling significance in applying the principles of agency.

We further believe that policy considerations support a finding of agency here. Everything that happened in this case was initiated by the Respondent and had the sole purpose of assisting the Respondent in its primary labor dispute with nonunion companies in Florida. The Respondent concedes that the actions taken by the Japanese Unions are a classic secondary boycott. To allow the factor of geography to prevail in determining the liability for the disputed conduct would be to permit the Respondent to escape responsibility for actions it set in motion--actions of the type Congress clearly intended to proscribe with the enactment of Section 8(b)(4)(ii)(B). In an increasingly global economy, the opportunities abound for U.S. unions to initiate harmful secondary activities by unions representing employees of the foreign trade partner. Permitting U.S. unions to escape responsibility purely on geographical grounds for the economic harm they unleash subverts the purpose of the Act.

For all these reasons, we find the Respondent authorized and ratified the disputed conduct of the Japanese Unions. We conclude that the Respondent is responsible for threats made by the Japanese Unions to neutrals involved in the Florida-Japan citrus trade that fruit loaded in Florida by nonunion labor would not be unloaded in Japan.

2. The disputed conduct meets the elements of a violation of Section 8(b)(4)(ii)(B)

Having found that the Respondent is responsible for the actions of the Japanese Unions, we find those actions fall within the proscription of Section 8(b)(4)(ii)(B). The parties stipulated that an object of the Respondent's conduct was to affect a primary dispute with Coastal and Port Canaveral Stevedoring. The parties also stipulated that the importers, exporters, and shipping companies contacted by the Japanese Unions were neutral to the labor dispute between the Respondent and Coastal and Port Canaveral Stevedoring, and were persons engaged the commerce or an industry affecting commerce within the meaning of Section 8(b)(4)(ii)(B). It is undisputed that the Japanese Unions' threats to refuse to unload fruit loaded by nonunion labor in Florida constituted coercive economic pressure. The Japanese Unions, acting as agents of the Respondent, threatened a secondary boycott of the kind prohibited by the Act. We, therefore, find that the disputed conduct falls within the proscriptions of Section 8(b)(4)(ii)(B).

3. The Board has jurisdiction over the disputed conduct

The final question we address is whether the conduct attributable to the respondent is within the Board's jurisdiction. The Respondent contends that there is no jurisdiction because the events occurred outside the geographic territory of the United States and, therefore, are beyond the application of the Act. We disagree. We find that the Board has jurisdiction over conduct initiated by a U.S. union and carried out by agents of a U.S. union, which conduct has the intent and effect of embroiling neutral persons engaged in commerce in a primary labor dispute between a U.S. union and U.S. employers located within the territory of the United States.

The United States Court of Appeals for the 11th Circuit addressed the issue of jurisdiction in its decision granting the Board's petition for injunctive relief under Section 10(1) in this proceeding.[11] Although the court was making only a reasonable cause determination, we fully agree with the court's reasoning, and we find that jurisdiction lies in this case.

The court rejected the Respondent's argument that certain Supreme Court cases[12] restricted the scope of the Act to conduct occurring only within the territory of the United States. The court stated: "The *Benz* cases do not represent generally applicable boundaries of commerce, but instead a judgment that Congress did not intend to interfere with the internal operation of foreign vessels."[13] The court further stated that the Supreme Court's refusal to allow extraterritorial application of Title VII in *EEOC v. Arabian American Oil*, supra, "is in fact a presumption that Congress intended to avoid 'clashes between our laws and those of other nations which could result in international discord.'"[14] (Citation omitted.)

The court then determined that several factors in the instant case support the assertion of jurisdiction:

> (1) the NLRA is here applied, as Congress intended, to protect persons in commerce from a secondary boycott, (2)

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[11] *Dowd v. Longshoremen ILA*, 975 F.2d 779 (11th Cir. 1992).

[12] *EEOC v. Arabian American Oil*, 499 U.S. 244 (1991); *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215 (1974); *Windward Shipping Ltd. v. American Radio Assn.*, 415 U.S. 104 (1974); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963); and *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

[13] *Dowd v. Longshoremen ILA*, 975 F.2d at 788.

[14] Id. at 789.

> the conduct was intended and had the effect of creating an unlawful secondary boycott in the United States, (3) certain significant conduct in furtherance of the secondary boycott occurred within the geographic territory of the United States, and (4) the fact that the Board is acting against a domestic labor organization subject to regulation under the NLRA.[15]

The court concluded that the threats made by the Japanese Unions were within the scope of the Act:

> Although the Supreme Court has limited the scope of the NLRA to avoid interference with the internal affairs of other nations, the Act is properly applied to the conduct of a domestic labor union which solicits a foreign union to apply pressure overseas with the intent and result of creating a secondary boycott in the United States. Further, the conduct charged in the Board's petition is now wholly extraterritorial; the letters requesting and ratifying the boycott threatened by the Japanese Unions were sent from the United States. Under these circumstances, nothing in the text or intent of the NLRA compels us to allow ILA to evade responsibility for effecting a successful secondary boycott in violation of the NLRA.[16]

We agree with the 11th Circuit's analysis. Assertion of jurisdiction in this case in no way interferes with the laws of Japan or affects the employment conditions of Japanese employees. Our remedial Order simply requires that the Respondent cease and

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[15] *Id.*

[16] *Id.* at 791.

desist from requesting that the Japanese Unions engage in secondary boycott activities in support of the Respondent.[17]

Accordingly, we assert jurisdiction and find that the Respondent violated Section 8(b)(4)(ii)(B) of the Act.

CONCLUSION OF LAW

The Respondent, acting through the Japanese Unions, threatened, coerced, or restrained shipping agents, shipping companies, citrus exporters, citrus importers, the Canaveral Port Authority, and other persons engaged in commerce or in an industry affecting commerce, who are neutral to the dispute between the Respondent and Coastal and between the Respondent and Canaveral and other nonunion stevedoring companies operating at Port Canaveral, Florida, where an object thereof was to force or require them to cease doing business with Coastal, and with Canaveral Stevedoring and other nonunion stevedoring companies operating at Port Canaveral, Florida, and with each other, and/or to otherwise alter their business relationships related to the shipment of citrus fruit from Ft. Pierce and Port Canaveral, Florida, to Japan. The Respondent thereby engaged in unfair labor practices affecting commerce in violation of Section 8(b)(4)(ii)(B) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, International Longshoremen's Association, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from requesting that the Japanese Unions or others threaten, coerce, or restrain shipping agents, shipping

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[17] This is not to say that the request, standing alone, was the unfair labor practice. As explained above, the unfair labor practice was the conduct of the Japanese Unions, for which the Respondent is responsible. However, the remedy for this unfair labor practice is confined to the Order described above.

companies, citrus exporters, citrus importers, the Canaveral Port Authority, and other persons engaged in commerce or in an industry affecting commerce, who are neutral to the dispute between the Respondent and Coastal Stevedoring Company and between the Respondent and Port Canaveral Stevedoring, Inc. and other nonunion stevedoring companies operating at Port Canaveral, Florida, where an object thereof is to force or require them to cease doing business with Coastal Stevedoring Company and with Port Canaveral Stevedoring, Inc. and other nonunion stevedoring companies operating at Port Canaveral, Florida, and with each other, and/or to otherwise alter their business relationships related to the shipment of citrus fruit from Ft. Pierce and Port Canaveral, Florida, to Japan.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Rescind, repudiate, and disavow in writing its letter of October 4, 1990.

(b) Post in its business offices and meeting halls copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days, in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Promptly after receipt of copies of the notice from the Regional Director, return signed copies for posting by Coastal Stevedoring Company, Port Canaveral Stevedoring, Inc., and other nonunion stevedoring companies operating at Port Canaveral, Florida, those parties willing, at all places where notices to their respective employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, concurring in the result.

I agree with my colleagues that in the unique circumstances of this case the Respondent, International Longshoremen's Association, AFL-CIO, is appropriately held responsible, under Section 8(b)(4)(ii)(B) of the Act, for threats made by Japanese Unions to neutral persons who are involved in the Florida-Japan citrus trade.

The prohibition against secondary boycotts in Section 8(b)(4) of the Act was drafted to protect neutral parties from illegal boycotts in their many forms and it is apparent from prior case law and the legislative history that Congress intended the prohibition against secondary boycotts to reach broadly. *Longshoremen v. Allied International*, 456 U.S. 212, 225 (1982).

There is no dispute in this case that neutral parties in the Florida-Japan citrus trade were in fact threatened. In light of the harm effected in this case, the dispositive question is whether the Respondent is responsible for that proscribed harm.

The Respondent concedes in the parties' stipulation of facts that it repeatedly invoked the aid of the Japanese Unions to threaten neutral persons doing business with nonunion stevedoring companies in the United States, with whom the ILA has a primary labor dispute. Thus, the Respondent stipulates that in the spring of 1989, an ILA delegation went to Japan for meetings with

several Japanese Unions to "express its concern over Japanese and foreign importers and shipping companies directly or indirectly utilizing non-union stevedores at Port Canaveral and Fort Pierce, Florida, and requested assistance from these entities." The Respondent additionally stipulated that its representatives met with Japanese Unions in early 1990 and again in the spring of 1990 to request their "cooperation with respect to the matter of the loading of citrus fruit bound for Japan at the Port of Fort Pierce and Port Canaveral, Florida." The ILA followed up these visits with a letter to Japanese Dockworkers President Kamezaki reiterating its request for support.

Following these requests for Japanese aid, the Japanese Unions wrote Japanese citrus importers, various shipping companies, and nonunion stevedoring companies in Florida and informed these neutrals that the Japanese Unions would take cooperative action with the ILA and boycott the unloading of citrus that was loaded in the U.S. by nonunion stevedores.

The Respondent further stipulates that by letter dated October 4, 1990, to the Japanese Dockworkers' Union, it requested their continued support and pledged to provide them with "photographs and descriptive material which will aid in your effort."

Upon the failure of various importers to obtain assurances that the Japanese Dockworkers would unload the Florida citrus in Japan, Japanese importers and their shipping lines directed their ship, the *Bagno El Triunfo*, to go to the port of Tampa for loading by ILA-represented longshoremen.

The Respondent stipulates that by letter dated November 6, 1990, it thanked the Japanese Unions for their help and noted that the diversion of the *Bagno El Triunfo* "is a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts. The Bagno El Triunfo will be handled by ILA in Tampa. Thank you." The Respondent further requested the continued support of the Japanese Unions. The

parties stipulate that thereafter numerous ships were likewise diverted to the port of Tampa for loading by ILA-represented longshoremen.

The Respondent thus stipulates that it repeatedly invoked the aid of the Japanese Unions and sought their assistance in pressuring neutrals in the Japan-Florida citrus trade. Even though the Respondent acknowledges its conduct, it attempts to avoid legal responsibility for the conduct of the Japanese Unions on its behalf by arguing that each technical element of the law of agency is not present in this case. However, as my colleagues recognize, the principles of agency law must be applied flexibly in the context of labor relations. With this legal analysis as a backdrop, I believe that the General Counsel has established a causal link between the ILA's invocation of action and the Japanese Unions' heeding that call to hold the ILA responsible under the National Labor Relations Act.

Accordingly, under these particular circumstances, where the Respondent concedes and stipulates that it successfully sought the Japanese Unions' agreement to engage on its behalf in secondary boycott conduct which the Act proscribes, I agree with my colleagues that the Respondent is responsible for that conduct and that it violated Section 8(b)(4)(ii)(B) of the Act.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT request that the Japanese Unions or others threaten, coerce, or restrain shipping agents, shipping companies, citrus exporters, citrus importers, the Canaveral Port Authority, and other persons engaged in commerce or in an industry affecting commerce, who are neutral to the dispute between us and Coastal Stevedoring Company and between us and Port Canaveral Stevedoring, Inc. and other nonunion stevedoring companies operating at Port Canaveral, Florida, where an object thereof is to force or require them to cease doing business with Coastal Stevedoring Company and with Port Canaveral Stevedoring, Inc. and other nonunion stevedoring companies operating at Port Canaveral, Florida, and with each other, and/or to otherwise alter their business relationships related to the shipment of citrus fruit from Ft. Pierce and Port Canaveral, Florida, to Japan.

WE WILL rescind, repudiate, and disavow in writing our letter of October 4, 1990.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1812 **September Term, 1994**

International Longshoremen's Association,

Petitioner,

v.

United States Court of Appeals
For the District of Columbia Circuit
FILED AUG 30 1995

National Labor Relations Board,

Respondent

BEFORE: Edwards, Chief Judge, Wald and Buckley, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing filed by intervenors and of the response thereto, it is

ORDERED that the petitions are denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1812 **September Term, 1994**

International Longshoremen's Association,

Petitioner,

V.

National Labor Relations Board,

Respondent

United States Court of Appeals
For the District of Columbia Circuit
FILED AUG 30 1995

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the intervenors' Suggestions for Rehearing In Banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestions are denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX D

Francis E. DOWD, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant

No. 91-3908.

United States Court of Appeals,
Eleventh Circuit.

Oct. 15, 1992.

National Labor Relations Board filed petition for injunction, alleging that American labor union violated secondary boycott provision of the National Labor Relations Board Act (NLRA) by inducing Japanese unions to pressure Japanese importers not to import Florida citrus fruit loaded onto ships by nonunion labor. The United States District Court for the Middle District of Florida, No. 91-742, Civ-T-21A, Ralph W. Nimmons, Jr., J., 781 F.Supp. 1565, adopting recommendation of Charles R. Wilson, United States Magistrate Judge, enjoined American union to refrain from threatening persons neutral to dispute and to repudiate its written request soliciting aid of Japanese unions. Union appealed. The Court of Appeals, Birch, Circuit Judge, held that: (1) Board presented substantial and not frivolous basis on which to attribute conduct of Japanese unions to American union, whether on theory of agency, ratification, or joint venture, and (2)

conduct of American union described in Board's petition was within jurisdictional scope of the NLRA.

Affirmed.

Ernest L. Mathews, Jr., Herzl S. Eisenstadt, New York City, for defendant-appellant.

J. David Richeson, James G. Brown, Richeson & Brown, Orlando, Fla., for amicus curiae Coastal Stevedoring Co.

Ellen A. Farrell, Laura Goodman, NLRB, Washington, D.C., Margaret Diaz, NLRB, Tampa, Fla., for plaintiff-appellee.

Paul M. Heylman, Robert L. Duston, Washington, D.C., for amici curiae Canaveral Stevedoring, Inc. and the Canaveral Port Authority.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, Circuit Judge, JOHNSON*, and BOWNES**, Senior Circuit Judges.

BIRCH, Circuit Judge:

In this case we must decide whether an American labor union which induces a foreign union to pressure foreign importers engaged in commerce, with the purpose and effect of establishing a secondary boycott in the United States, commits a violation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1988) ("NLRA"). Finding that the Regional Director of the National Labor Relations Board (the "Board") had articulated a substantial

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

legal and factual basis to support a finding that unfair labor practices had been committed, the district court imposed a temporary injunction under section 10(*l*) of the NLRA. 781 F.Supp. 1565. We AFFIRM.

I.

For the past several years, Florida grapefruit has been shipped to Japan from Fort Pierce and Port Canaveral pursuant to agreements between American exporters and Japanese importers. The International Longshoremen's Association ("ILA") is engaged in a labor dispute with Coastal Stevedoring Company ("Coastal") and Port Canaveral Stevedoring Limited ("Canaveral"), which operate from Fort Pierce and Port Canaveral respectively. Both Coastal and Canaveral use non-union labor to load shipments of grapefruit bound for Japan, where fruit is unloaded by employees of Japanese stevedoring companies.

Prior to the 1990-1991 shipping season, ILA delegates visited Japan and met with representatives of the National Council of Dockworkers' Unions of Japan, the Japan Labor Union Association, and the Japan Seamen's Union (collectively, the "Japanese Unions"). The ILA expressed its concern over the use of non-union labor at several Florida ports and requested the assistance of the Japanese Unions in pressuring participants in the citrus trade to use stevedoring companies which employ union labor. In various communications, widely disseminated among participants in the grapefruit export industry, Japanese Union officials requested that importers ensure that the fruit they purchased was loaded in Florida by stevedoring companies that hire *union* employees. Further, these communications warned that dockworkers belonging to the Japanese Unions would refuse to unload fruit loaded in American ports by non-union labor.

In a letter dated October 4, 1990, ILA president John M. Bowers informed Toshio Kamezaki, president of the National Council of Dockworkers' Unions of Japan, of ILA's plans to

picket Coastal and Canaveral. He stated that "[y]our further support in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the International Longshoremen's Association. . . ." R1-24-6.

Several Japanese importer expressed their concern to Florida exporters and stevedoring companies that Japanese dockworkers would not handle fruit loaded in Florida by non-union labor. Subsequent communications reveal that, as a result at least one ship was diverted from Fort Pierce, where it would have been handled by non-union labor, to Tampa, where it was loaded by longshoremen represented by ILA. In a letter to the National Council of Dockworkers' Unions of Japan dated November 6, 1990, ILA special consultant Ernest Lee noted that the diversion of this ship to Tampa was "a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts." R1-1-Ex. 8. Further, Lee noted that "[y]our continued efforts on our behalf will be most appreciated." *Id.* These efforts continued with demonstrated success. After news of the boycott threatened by the Japanese Unions on behalf of ILA filtered through the industry, neither Canaveral nor Coastal handled another shipment of citrus bound for Japan for the remainder of the 1990-1991 export season.

On June 14, 1991, the Board filed a petition for injunction pursuant to section 10(*l*) of the NLRA alleging that there was reasonable cause to believe that ILA had threatened, coerced, or restrained neutral persons to cease doing business with Coastal and Canaveral in violation of NLRA section 8(b)(4)(ii) and that injunctive relief was just and proper. The magistrate judge issued a report and recommendation that the petition be granted.

Following review of the record, the district court adopted the report of the magistrate judge and ordered ILA, pending a final adjudication by the Board, to refrain from threatening persons

neutral to the dispute with Coastal and Canaveral and to repudiate its written request soliciting the aid of the Japanese Unions.

II.

Section 8(b)(4)(ii)(B) of the NLRA prohibits coercion or refusals to deal aimed at employers or others not principally involved in an underlying labor dispute, i.e., "secondary" or "neutral" employers, while preserving the right of labor organizations to bring such pressure against employers *primarily* involved in the dispute.[1] Section 10(*l*) of the NLRA is thus an exception to the general prohibition in the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1988) against federal injunctions in labor disputes. Section 10(*l*) authorizes the district court to grant interim injunctive relief pending the Board's resolution of charges involving certain labor practices, such as the secondary boycott at issue here, which are likely to have a particularly disruptive effect upon the flow of commerce. 29 U.S.C. § 160(*l*).

When confronted with a petition for injunction under section 10(*l*), the "function of the District Court is not to determine whether an unfair labor practice has in fact been committed, but simply to determine whether is reasonable cause to believe that a violation of the [National Labor Relations] Act has occurred." *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445,

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[1] Section 8(b) provides that "[it] shall be an unfair labor practice for a labor organization or its agents . . .

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other . . . person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ." 29 U.S.C. § 158(b).

454 (5th Cir. 1980). The district court's inquiry into reasonable cause "is limited to evaluating whether the Board's 'theories of law and fact are not insubstantial and frivolous.'" *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992), (quoting *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976)).[2] This deferential review is appropriate at the injunction stage even where the theory underlying the petition is "untested" or "novel," in order to preserve the legal issue for Board determination. *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir. 1973). In addition to demonstrating reasonable cause to believe that an unfair labor practice has occurred, the Board must show that equitable relief is "just and proper" under the circumstances. 29 U.S.C. § 160(*l*); *Arlook*, 952 F.2d at 372.

The conclusion of the district court that the Board has presented a substantial and not frivolous legal theory is subject to our plenary review on appeal. *Arlook*, 952 F.2d at 372. Neither the Board's evidentiary showing nor the equitable propriety of the injunction has been questioned by ILA. ILA challenges only the Board's legal theory, arguing that ILA did not "threaten, coerce, or restrain" any person as required by section 8(b)(4)(ii)(B), and that the conduct of the Japanese Unions, while clearly of the type proscribed by this section, may not be attributed to ILA. Further, ILA contends that the district court had no jurisdiction to grant an injunction because the conduct at issue occurred beyond the

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[2] Although *Arlook* involved a petition under section 10(j), the determination of reasonable cause under that section does not differ from that applicable to a section 10(*l*) petition. *Boire v. Teamsters*, 479 F.2d 778, 787 n. 7 (5th Cir. 1973). Further, two other circuits have recently described the reasonable cause standard for a petition under 10(*l*) in the terms used in *Arlook*. *See Hoeber v. Local 30, United Slate, Tile & Composition Roofers*, 939 F.2d 118, 123 (3rd Cir. 1991); *Gottfried v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 80*, 927 F.2d 926, 927 (6th Cir. 1991).

territorial scope of the NLRA. We find it instructive to address the jurisdictional issue after first considering ILA's objection that its conduct does not fall within the language of section 8(b).

III.

ILA argues that it did not "threaten, coerce, or restrain" any person in commerce, as required to find a violation of section 8(b)(4)(ii), but merely requested the aid of the Japanese Unions, who in turn threatened various Japanese importers. The Board urges us to attribute the conduct of the Japanese Unions to ILA based on theories of agency, ratification, and joint venture.[3] ILA

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[3] ILA argues that the district court erred by rejecting the agency theory proposed by the Board and substituting another rationale for granting the petition. The report adopted by the district court does appear to rely in part upon the theory that ILA violated 8(b)(4)(ii) by informing the Japanese Unions of its own intention to picket Coastal and Canaveral directly. The Board did not proceed on this theory in its petition, nor does it appear that the injunction could be sustained upon this ground. Section 8(b)(4)(ii)(B) exempts picketing against entities, such as Coastal and Canaveral, which are involved as *primary* actors in the underlying labor dispute. It does not seem that ILA's threats to picket Coastal and Canaveral, even if communicated to neutrals via the Japanese Unions, would violate section 8(b)(4)(ii). We are, however, not required to decide this issue. Even if its theory is legally sound of its own merit, the district court may not uphold action by an administrative agency on a ground not advocated by the agency. *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 672 n. 6, 101 S.Ct. 2573, 2577 n. 6, 69 L.Ed.2d 318 (1981). *See also NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 517-18 (7th Cir. 1991) (unlike the decision of a district court, the actions of an administrative agency cannot be sustained on a ground to which the agency made no reference; the agency's decision must stand or fall upon its express reasoning).

We uphold the injunction upon the agency theory proposed by the Board in its petition. Although the report adopted by the district court does not warmly embrace the Board's theory, the report incorporates enough of the Board's proposed findings and conclusions to include the theory of agency. R1-24-19-20. Further, while we may not uphold the injunction on a ground not articulated by the Board, we are free to uphold the decision *of the district court* upon grounds not relied upon by that court. *See SEC v. Chenery Corp.*, 318 U.S. at 88, 63 S.Ct. at 459. We would be free to uphold the injunction upon the Board's

maintains that the record is devoid of any evidence that the dealings between ILA and the Japanese Unions satisfy the formal requisites of an agency or joint venture relationship, or to support the Board's theory of ratification.

When adjudicating an unfair labor practice under the NLRA, common law concepts of agency are to be applied broadly to effectuate the statutory purpose. In condemning certain unfair labor practices by an employer, the Supreme Court stated:

> The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior. We are dealing here not with private rights nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence.

International Ass'n of Machinists, 311 U.S. 72, 80, 61 S.Ct. 83, 88, 85 L.Ed. 50 (1940) (citation omitted). *See also H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 521, 61 S.Ct. 320, 323, 85 L.Ed. 309 (1941). "Transplantation of ordinary agency law, which arises out of ordinary contract and tort disputes, into the NLRA context necessarily requires sensitivity to the particular circumstances of industrial labor relations. Courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented." *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*,

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agency theory even if the district court explicitly had rejected that theory. We note further that, in finding a reasonable basis to support the Board's theory, we rely solely upon the factual findings contained in the report adopted by the district court.

735 F.2d 1384, 1394 (D.C. Cir.), *cert denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984). Against this backdrop, we conclude that the Board has articulated a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese Unions to ILA.

A.

Initially, we find reasonable grounds to support the Board's theory of agency. ILA does not attempt to dispute that the Japanese Unions acted at ILA's request as communicated by its representatives sent to Japan and in two subsequent letters. Further, the pressure by the Japanese Unions clearly was exerted on behalf of ILA. Mustering the finer distinctions of the law of agency, ILA first contends that there was no formal agency relationship because ILA had no right to control the actions of the Japanese Unions. Second, emphasizing that an agent performs a task in the principal's stead, ILA argues that, since it had no power to direct Japanese dockworkers to refuse to unload goods, it could not be a principal for purposes of delegating that power to the Japanese Unions. In the context of the NLRA, we find these arguments unpersuasive.

With regard to the first objection, ILA admittedly had no legal power to compel the Japanese Unions to assist in the dispute with Coastal and Canaveral. This lack of legal obligation, while perhaps dispositive in some theoretical suit between ILA and the Japanese Unions for breach of an agency agreement, does not allow ILA to avoid responsibility for violations of the NLRA conducted on its behalf and at its request. Several precedents involving employer and union responsibility for the unfair labor practices of another actor are instructive. The former Fifth Circuit held that where an employer encouraged the local Chamber of Commerce director to campaign against the formation of a union and failed to effectively disavow such interference, the employer was responsible for the director's conduct, despite the fact that the

director was not the employer's formal agent. *Cagle's Inc. v. NLRB*, 588 F.2d 943, 947-48 (5th Cir. 1979). The court found that the employer had engaged in unfair labor practices despite the fact that the employer obviously had no more legal power to compel the director of the Chamber of Commerce to join the anti-union effort than ILA enjoyed over the Japanese Unions. Similarly, the NLRB found an employer responsible for the anti-union activities of a community organization where the employer encouraged the efforts of the organization and failed to rebut the statement in the propaganda distributed by the organization warning that the employer would close its manufacturing plant if a union was organized. *Star Kist Samoa, Inc.*, 237 N.L.R.B. 238 (1978). In that case the employer had no right to demand or control the actions of the community organization. Under the liberal application of agency concepts appropriate in the labor context, a contractual right to control and direct the performance of another is not required to impose responsibility under section 8(b) where an employer or union has encouraged or requested another to engage in unfair labor practices on its behalf.[4]

The argument that ILA could not retain an agent to perform a task, i.e., directing Japanese dockworkers to refuse to unload cargo, which ILA had no authority to accomplish alone is similarly unpersuasive. It is not clear that a principal must always

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[4] We also find instructive the line of cases holding that, although members are not ordinarily agents of their union, a union may under certain circumstances be responsible for acts of its members based on an awareness of the conduct and a failure to repudiate the acts. *See, e.g., Soft Drink Workers Union, Local No. 812*, 304 NLRB No. 22 (Aug. 19, 1991) (where union was aware of unfair labor practices by member on behalf of union and failed to repudiate the conduct, union was responsible for member's actions); *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union, based upon union's apparent endorsement and ratification, even absent evidence that union actually initiated or endorsed the picketing). Where, as here, the conduct violative of section 8(b) was actually requested by and performed on behalf of the union, the case of agency appears all the stronger.

be able to personally perform the task for which he or she retains an agent. For example, an attorney representing a corporation in federal court acts as an agent, despite the fact that the corporate entity would be forbidden to represent itself in such a proceeding.[5] Further, although routing its request via the Japanese Unions was perhaps the only *practical* means of ensuring that Japanese laborers refused to unload Florida citrus produce, it was clearly *possible* for ILA directly to request that the Japanese workers forbear, without the aid of the Japanese Unions as intermediaries. In *Cagle's Inc. v. NLRB*, the employer used the director of the local Chamber of Commerce as a vehicle to disseminate more effectively its anti-union message. Here, ILA selected the Japanese Unions to ferry its request. We decline to reject the Board's theory of agency simply because ILA selected a messenger more capable than itself. Based on applicable precedents, the Board has advanced a substantial and not frivolous legal theory upon which to assign responsibility to ILA for the conduct of the Japanese Unions.

B.

The ratification theory proposed by the Board also passes muster under the applicable standard of review. Even if the Japanese Unions did not act as agents when initially threatening to boycott fruit loaded in Florida by non-union workers, the subsequent conduct by ILA ratified the threatened boycott. This appears most clearly in the November letter in which ILA special consultant Lee, after acknowledging that the diversion of a Panamanian ship from Port Canaveral was the result of pressure by Japanese Unions, *thanked* the Japanese Unions for this effort "on our behalf" and *requested* continued efforts of the same character. NLRB decisions clearly teach that where a union

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[5] *See Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385-86 (11th Cir. 1985), *cert denied*, 474 U.S. 1058, 106 S.Ct. 799, 88 L.Ed.2d 775 (1986).

affirms prior conduct performed on its behalf, the union may be responsible for the unfair labor practices of another even where the conduct did not bind the union at the time it occurred. *See Service Employees Union, Local No. 87*, 291 NLRB 82 (1988). Even if, as argued by ILA, the Japanese Unions acted merely out of "the general antagonism of all labor unions to the use of non-union labor" (Appellant's Reply Br. 16), ILA was not free to use this unrest and resentment to restrain and coerce neutral entities in its dispute with Coastal and Canaveral. *See Sheet Metal Workers Union, Local No. 2*, 203 NLRB 954, 956 (1973) (even in absence of evidence that union induced walk off, union was liable if union official used *existing* worker unrest to coerce employer). Based upon ILA's expression of appreciation for the threatened boycott by the Japanese Unions and its request for a continued refusal to deal, we conclude that the Board has presented a substantial and not frivolous basis upon which to conclude that ILA ratified the conduct of the Japanese Unions.

C.

Finally, we find a reasonable basis to support the Board's "joint venture" theory. ILA argues that its relationship with the Japanese Unions lacks the elements of a formal joint venture, defined as (1) a community of interest in performance of a common purpose, (2) joint control or right of control, (3) a joint proprietary interest, and (4) a right to share in profits. Strict application of these elements, sensitively crafted in the commercial context, simply is not appropriate in the area of the NLRA. *See International Ass'n of Machinists*, 311 U.S. at 80, 61 S.Ct. at 88; *H.J. Heinz Co.*, 311 U.S. at 521, 62 S.Ct. at 323; *Local 1814, Int'l Longshoremen's Ass'n*, 735 F.2d at 1394. It appears that the NLRB will attribute responsibility based on the theory of joint venture or common cause where certain elements of the classic commercial joint venture are at best weakly present. In *Bricklayers, Masons & Tile Setters, Local No. 20*, 174 NLRB 1251, 1251-2, 1259-63 (1969), the NLRB found that a trade

council and its four constituent unions engaged in a "joint venture or common cause" to picket an employer. Although mere affiliation of the unions in a common trade council would not establish a joint venture, participation by agents of each union and a common design to pressure a single employer did support such a finding. 174 NLRB at 1260-63. Similarly in *Seattle District Council of Carpenters*, 114 NLRB 27, 29-30 (1955), four unions were held jointly and severally liable on a theory of joint venture where agents of each union acted to implement and further the effectiveness of picketing initiated by one union, all in pursuit of a common purpose.

Here ILA and the Japanese Unions engaged in a common enterprise designed to deter neutrals from employing non-union labor. ILA formulated the plan, requested the assistance of the Japanese Unions, and promised to supply information regarding ships destined to be unloaded by non-union labor. The Japanese Unions secured the participation of the dockworkers in Japan. Although, as argued by ILA, the Japanese Unions may have lacked any direct proprietary or financial interest in pressuring neutrals in the citrus export industry, there is no indication in NLRB precedents that participation motivated by labor solidarity would not sustain a finding of joint venture in the more liberal context of the NLRA. In short, the Board easily has articulated a substantial and not frivolous basis for attributing the conduct of Japanese Unions to ILA.

D.

ILA argues that by attributing threats and coercion by the Japanese Unions to ILA, we render sections 8(b)(4)(i) and 8(b)(4)(ii) redundant. Section 8(b)(4)(i) prohibits a union from engaging in a strike or refusal (in the course of employment) which targets neutral entities or encouraging or inducing another to do so. Section 8(b)(4)(ii) forbids a union to threaten, coerce, or restrain any person engaged in commerce. Here the Board

proceeded exclusively under the second subsection, apparently based upon a belief that the Japanese Unions which were encouraged or induced by ILA were not "individual[s] employed by any person engaged in commerce" as required by section 8(b)(4)(i).

ILA points out that by holding a union which requests another to engage in coercive behavior vicariously liable under section 8(b)(4)(ii), there would be no need for section 8(b)(4)(i). The Board's interpretation, however, does not render the subsection superfluous since section 8(b)(4)(i) would reach the *unsuccessful* encouragement of another to engage in coercion or restraint, which would not fall under 8(b)(4)(ii). Further, the two sections inevitably overlap. For example, it is difficult to imagine a strike or refusal to deal in violation of subsection (i) which did not also threaten, coerce, or restrain as forbidden by subsection (ii). In interpreting the NLRA, other circuits have noted that the same conduct by an employer or union may at once satisfy the requirements of several subsections.[6] Even if we were to accept each premise offered on this point by ILA, the risk of rendering these subsections somewhat more redundant would not warrant holding the Board's legal theory unsubstantial or frivolous at this stage in the proceeding. ILA has not suggested any way in which we would frustrate Congress' intent in enacting section 8(b) by upholding the Board's theory. Instead, the ILA's interpretation would allow a union to escape responsibility for actions which ILA concedes would constitute a classic secondary boycott if the

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[6] *See Local Union No. 277, Int'l Brotherhood of Painters v. NLRB*, 717 F.2d 805, 808 (3rd Cir. 1983) ("A finding that a union provoked or attempted to provoke discrimination in violation of section 8(b)(2) is usually accompanied by a finding that the same conduct constituted coercion in violation of section 8(b)(1)(A)."); *Indiana & Mich. Elec. Co. v. NLRB*, 599 F.2d 277, 229 n. 2 (7th Cir. 1979) ("A violation of § 8(a)(1) [forbidding employer discrimination against an employee's union activities] constitutes a derivative violation of § 8(a)(3) [forbidding coercion or interference with rights of employees] when . . . the employer's acts served to discourage union membership or activities.").

Japanese Unions had been "person[s] in commerce." We believe that the statutory purpose is best vindicated by the Board's interpretation.

IV.

Having more precisely described ILA's responsibility for the threatened secondary boycott, we consider whether the conduct alleged in the Board's petition falls within the scope of the NLRA. ILA contends that, even if the actions of the Japanese Unions could be attributed to ILA, these acts occurred outside the geographic territory of the United States and therefore beyond the intended application of the NLRA. ILA directs our attention to the recent decision of the Supreme Court in *EEOC v. Arabian American Oil Co.*, _____ U.S. ____, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) and to a line of cases founded on *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957) limiting the application of the NLRA.

A.

In *EEOC v. Arabian American Oil*, the Supreme Court held that Title VII does not protect an American citizen employed and terminated in Saudi Arabia by an American employer. _____ U.S. ____, 111 S.Ct. at 1229. Conceding that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States, the Court considered whether Congress intended Title VII to apply in these circumstances in light of the "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" _____ U.S. ____, 111 S.Ct. at 1230 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949)). The Court held that Title VII focuses purely upon domestic employment relationships and that the structure of the statute did not suggest that Congress intended to regulate the termination of an American citizen by an American employer where the employee worked and

was discharged in Saudi Arabia. _____ U.S. ____, 111 S.Ct. at 1229.

The Supreme Court has held that the NLRA does not regulate the practices of owners of foreign vessels which are temporarily present in an American port with regard to foreign employees working on these vessels. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963). Further, the NLRA does not encompass picketing by an American labor union at an American port where such picketing is aimed at altering the employment relationship between owners of foreign vessels and foreign seamen. *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 419 U.S. 215, 95 S.Ct. 409, 42 L.Ed.2d 399 (1974); *Windward Shipping (London), Ltd. v. American Radio Ass'n*, 415 U.S. 104, 94 S.Ct. 959, 39 L.Ed.2d 195 (1974); *Benz v. Compania Naviera Hidalgo*, S.A., 353 U.S. at 142-46, 77 S.Ct. at 702-04.

ILA argues that the presumption against the extraterritorial application of statutes affirmed in *EEOC v. Arabian American Oil*, coupled with the cases in the *Benz and McCulloch* line, dictate that the conduct described in the Board's petition for injunction is not regulated by the NLRA. ILA would have us hold that conduct occurring outside the geographic boundaries of the United States may not be reached by the NLRA, without regard to the origin of the actors or the intent or effect of the conduct. We do not believe that either *EEOC v. Arabian American Oil*, or the *Benz* line of cases dictate such an unsophisticated test. We conclude that the NLRA reaches the conduct of an American union which solicits a foreign entity to apply pressure overseas with the intent and effect of gaining an unlawful advantage in a primary labor dispute in the United States by coercing American employers.

In *Benz* and the subsequent cases named above, the Court did not restrict the scope of the NLRA to conduct which occurs within the geographic boundaries of the United States. To the contrary,

each of these cases dealt either with employment relations upon a foreign vessel docked at an *American* port or the picketing activity of a domestic labor union *in the United States*. In each case, despite the fact that the conduct at issue was well within the geographic reach of American law, the Court held that the NLRA was not intended to apply. The *Benz* cases do not represent generally applicable boundaries of commerce, but instead a judgment that Congress did not intend to interfere with the internal operation of foreign vessels. As the Court explained in *Windward Shipping*:

> The term "in commerce," as used in the LMRA, is obviously not self-defining, and certainly the activities in *Benz, McCulloch*, and *Incres [S.S. Co. v. International Maritime Workers Union*, 372 U.S. 24, 83 s.Ct. 611, 9 L.Ed.2d 557 (1963)], held not covered by the Act, were literally just as much "in commerce" as were the activities held covered in [*International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 90 S.Ct. 872, 25 L.Ed.2d 218 (1970)]. Those cases which deny jurisdiction to the NLRB recognize that Congress, when used it used the words "in commerce" in the LMRA, simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade.

415 U.S. at 112-13, 94 S.Ct. at 964.[7] *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982), provided the Court with another opportunity to amplify *Benz* and *McCulloch*. The Court

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[7] In *Windward Shipping*, the Court held that picketing against a foreign employer of foreign workers was not included in the NLRA on the grounds that "[v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." 415 U.S. at 115, 94 S.Ct. at 965.

held that ILA's refusal to unload cargo shipped from the Soviet Union in protest of the Afghanistan invasion violated the secondary boycott provisions of the NLRA. 456 U.S. at 222-26, 102 S.Ct. at 1662-64.

> Unlike the situation in every case from *Benz* through *Mobile*, the ILA's refusal to unload Allied's shipments in no way affected the maritime operations of foreign ships. The boycott here did not aim at altering the terms of employment of foreign crews on foreign-flag vessels. It did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners. The longstanding tradition of restraint in applying the laws of this country to ships of a foreign country--a tradition that lies at the heart of *Benz* and every subsequent decision--therefore is irrelevant to this case.

456 U.S. at 221, 102 S.Ct. at 1662. Most recently, in *EEOC v. Arabian American Oil*, the Court confirmed that the presumption against extraterritorial application is in fact a presumption that Congress intended to avoid "clashes between our laws and those of other nations which could result in international discord." _____ U.S. at _____, 111 S.Ct. at 1230.

B.

Guided by these precedents, we hold that the alleged violation of section 8(b)(4)(ii) by ILA falls within the scope of the NLRA. Specifically, the Board's exercise of jurisdiction is supported by several factors: (1) the NLRA is here applied, as Congress intended, to protect persons in commerce from a secondary boycott, (2) the conduct was intended and had the effect of creating an unlawful secondary boycott in the United States, (3) certain significant conduct in furtherance of the secondary boycott occurred within the geographic territory of the United States, and (4) the fact that the Board is acting against a domestic labor organization subject to regulation under the NLRA.

Although the NLRA was not intended to regulate the relationship between foreign seamen and the owners of foreign vessels, section 8(b)(4) was designed to limit the scope of primary labor disputes and to shield "unoffending employers and others from pressure in controversies not their own." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951). The protection of neutral entities such as the Canaveral Port Authority, which received a tariff on vessels loaded by Canaveral, as well as the exporters who did business with Canaveral and Coastal falls squarely within the purposes of the NLRA.[8] Further, foreign corporations, such as the shippers and importers involved in the Florida citrus trade, who do business in the United States are "within commerce" for the purposes of enjoying the protection against secondary boycotts

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[8] Although the Japanese Unions may not have directly communicated their threats to the domestic exporters and shippers operating from Florida, these entities were threatened, coerced, or restrained within the meaning of section 8(b)(4). The NLRB has held that all neutrals affected by a union's announced course of conduct are threatened within section 8(b)(4) even though the union does not directly communicate the threat to a particular neutral. In *International Longshoremen's Ass'n (Kansas Farm Bureau)*, 264 NLRB 404, 407-08 (1982), *enforced, International Longshoremen's Ass'n v. NLRB*, 723 F.2d 963 (D.C.Cir. 1983), the union induced employees of a neutral stevedoring company to refuse to load goods for export to the Soviet Union. Although the only direct communication by the union was in the form of a policy statement to its members and local affiliates, this conduct was found to threaten, within the meaning of section 8(b)(4)(ii), the stevedoring companies, an American shipping agency which contracted with the Soviet Union, and a vessel commissioned by the U.S.S.R. to transport the boycotted grain. 264 NLRB at 407-08. The Board reasoned that the union "must have foreseen that neutral employers such as [the shipping] Agencies, Stevedores, and the *Belgium* would be forced to cease doing business with [the Soviet chartering corporation] and Cargill [an American grain exporter], and with each other." *Id. See also Tri-State Bldg. & Constr. Trades Council (Backman Sheet Metal)*, 272 NLRB 8, 8 n. 1, (1984), *aff'd, International Brotherhood of Boilermakers, Local No. 105 v. NLRB*, 781 F.2d 569 (6th Cir. 1986).

in section 8(b)(4).[9] This case thus contrasts sharply with *McCulloch*, in which the Court considered the jurisdiction of the Board to order an election among foreign seamen employed aboard a Honduran ship. There the Court, emphasizing that the NLRA was enacted as "a bill of rights both for *American* workingmen and for their employers," held that the NLRA did not contemplate the internal management and affairs of foreign vessels. 372 U.S. at 20; 83 S.Ct. at 677. Here we are confronted with the Board's application of section 8(b)(4) on behalf of the very parties which Congress intended to protect. Further, the present action does not involve the prospect of interfering with the internal operation of foreign vessels or offending in any fashion the principles of international comity which guided the court in *Benz* and its progeny.[10]

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[9] *See International Longshoremen's Ass'n, Local No. 1414 (Occidental Chemical Corp.)*, 261 NLRB 1, 4 (1982), *enforced mem., International Longshoremen's Ass'n v. NLRB*, 702 F.2d 1205 (D.C.Cir. 1983); *International Longshoremen's Assoc. (Kansas Farm Bureau)*, 264 NLRB at 406. *See also State Bank of India v. NLRB*, 808 F.2d 526, 531-34 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987).

[10] We do not suggest that under these facts the Board would have jurisdiction over the Japanese Unions involved in the secondary boycott. The Board has not attempted any action against these foreign labor organizations and, therefore, this question is not before us. Nor does the prospect of drawing such organizations within the ambit of the NLRA deter us from upholding this exercise of jurisdiction over ILA. First, the Board has tailored its decisions to avoid undue interference in the internal affairs of foreign entities. *See, e.g., GTE Automatic Electric, Inc.*, 226 NLRB 1222 (1976) (no jurisdiction over American employer of American employees where employer was doing business in Iran); *RCA OMS, Inc. (Greenland)*, 202 NLRB 228, 228 (1973) (no jurisdiction over Danish employer doing business in Greenland where employees, although hired in United States, worked exclusively in Greenland where controversy arose). More importantly, we suspect that the principle which guided the Court in *Benz* and *McCulloch* would be a sufficient hedge against applications of the NLRA which risk undue intrusion into another nation's internal affairs. As interpreted in *Windward Shipping*, these cases teach that conduct which is otherwise "in commerce" may be removed from the scope of the NLRA to respect "longstanding principles of comity and accommodation in international maritime trade." 415 U.S. at 112-13, 94 S.Ct. at 964. We therefore see no need to

Since the object and effect of the conduct in question was to implement a secondary boycott within the United States, we do not believe the location of that conduct is determinative. Where the object of the unlawful threats and coercion is to gain an advantage in a domestic labor dispute by pressuring neutrals which are protected under the NLRA, the fact that the principal threats by the Japanese Unions were uttered overseas is of little significance. By analogy, where an agreement to restrain trade and a majority of furthering acts occur outside the United States, the Sherman Act will nonetheless reach the conspiracy, provided that the conduct is intended to and results in substantial effects within the United States.[11] Other circuits have confirmed the application of the Commodity Exchange Act[12] and the Securities and Exchange Act[13] to conduct occurring outside the United States which causes

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artificially constrict the scope of the NLRA over the conduct of an American labor organization.

[11] *In re Insurance Antitrust Litigation*, 938 F.2d 919, 931-34 (9th Cir. 1991), *petition for cert. filed* (Jan. 9, 1992), *and petition for cert. filed* (Jan 10, 1992), *and petition for cert. filed* (Jan. 13, 1992), *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C.Cir. 1984).

[12] In *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871, 105 S.Ct. 221, 83 L.Ed.2d 151 (1984), the Seventh Circuit sustained jurisdiction over a dispute between nonresident aliens trading on United States exchanges even though all of the contacts between the parties, including the unlawful solicitation and misrepresentation by the trader occurred in Lebanon. The court specifically upheld the exercise of jurisdiction under the "effects test" for transnational disputes under which United States courts may reach conduct occurring in foreign countries which has foreseeable and substantial effect in this country. 730 F.2d at 1107-08.

[13] *See Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.), *cert. denied*, _____ U.S. _____, 112 S.Ct. 638, 116 L.Ed.2d 656 (1991); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975). *See also Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 416-17 & n.12 (8th Cir.1979) and cases cited therein.

foreseeable and substantial effects within the United States. The intent and result of the conduct described in the Board's petition clearly was to effect a secondary boycott in the United States; therefore, ILA's conduct falls within the scope of the NLRA.[14]

Moreover, significant actions taken in this country by ILA support the Board's jurisdiction. Although the initial meeting between ILA representatives and those of the Japanese Unions occurred in Japan, ILA repeated and affirmed its request in the October letter mailed from New York. Further, ILA ratified the actions of the Japanese Unions in the November letter mailed from Washington, D.C. Therefore, some of the actions upon which ILA's liability is based occurred within the United States, and the NLRA is properly involved to reach such conduct.

Finally, we consider it appropriate that the NLRA is here applied to regulate the conduct of a domestic labor organization operating in the United States. ILA may not immunize its unfair labor practices by the simple device of selecting a foreign intermediary or by confining its coercion and threats to those participants in the flow of commerce between the United States and Japan who happen to reside in the latter country.

V.

We hold that the Board has presented a substantial and not frivolous basis upon which to attribute the conduct of the Japanese Unions to ILA. If this was a dispute between private parties sounding in tort or contract, certain of the elements required to find an agency or joint venture relationship might well be lacking.

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[14] The Supreme Court has not ignored the effects of union conduct in its jurisdictional analysis of the NLRA. In *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, the Court noted that NLRB jurisdiction over an ILA boycott of goods bound for the U.S.S.R. was supported by the effect of the boycott upon national policy regarding exports to the Soviet Union. 456 U.S. at 221 n.17, 102 S.Ct. at 1662 n.17.

In the more liberal concept of agency appropriate to the NLRA, however, ILA is accountable for the actions of the Japanese Unions.

The conduct described in the Board's petition is within the scope of the NLRA. Although the Supreme Court has limited the scope of the NLRA to avoid interference with the internal affairs of other nations, the Act is properly applied to the conduct of a domestic labor union which solicits a foreign union to apply pressure overseas with the intent and result of creating a secondary boycott in the United States. Further, the conduct charged in the Board's petition is not wholly extraterritorial; the letters requesting and ratifying the boycott threatened by the Japanese Unions were sent from the United States. Under these circumstances, nothing in the text or intent of the NLRA compels us to allow ILA to evade responsibility for effecting a successful secondary boycott in violation of the NLRA. We find that the Board articulated a substantial legal and factual basis for a finding that unfair labor practices has been committed. We AFFIRM the imposition of a temporary injunction.

APPENDIX E

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION • AFL-CIO
815 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20005 202-628-4546

November 6, 1990

Toshio Kamazaki, President
National Council of Dockworker;s[sic]
Unions of Japan
Nikkofuku-kaikan 5-10-2, Kamata Ohta-ku
Tokyo 144, Japan

Dear Brother Kamazaki:

At president Bowers' request, I am very happy to notify you that M/V Bango El TRIUNFO, Panamanian ship operated by Cool Carriers, was diverted from Port Canaveral in Florida and went to Tampa, Florida for loadind[sic] of citrus destined for Tokyo. The ship has arrived at Tampa and loading is scheduled for November 6th through 9th, 1990 at Tampa.

The ILA was prepared to picket the M/V Bango El Triunfo and is continuously ready to picket other ships scheduled to load non-union at port Canaveral and Fort Pierce, Florida.

The diveration[sic] to Tampa is a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts. The MV Bango El Triunfo will be handled by ILA in Tampa. Thank you.

This is one ship. There will be others for which we will be prepared. Your continued efforts on our behalf will be most appreciated. Rather than diversions, we would be pleased to see Incoming[sic] vessels contracting with and employing union atavadores[sic] at Port Canaveral and Fort Pierce for their unloading and ours we believe this can be accomplished.

Please notify General Secretary Chitose and J&U International Affairs Director Masahiko Nakamuro of this development.

With kind regards and best wishes,

Sincerely and fraternally,

Ernest S. Lee
Special Consultant

MSL/M
cc: President Bowers
Local 2402 President Harvey

(2)

Supreme Court, U.S.
FILED
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No. 95-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 4

1. The Decision of the D.C. Circuit Does Not Undermine But Furthers the Congressional Policy Enacted in the NLRA 4

2. The Decision Below Does Not Conflict With the Decision of Any Other Court 6

3. The Court of Appeals Properly Thwarted the NLRB's Attempt to Misapply the Law of Agency 10

4. This Case Is Not of Exceptional Importance So as to Require Supreme Court Review 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page(s)**

American Trucking Associations v. NLRB,
734 F.2d 966 (4th Cir. 1984), *aff'd*,
473 U.S. 61 (1985) 9

Aurora Packing Co. v. NLRB,
904 F.2d 73 (D.C. Cir. 1990) 15

Cagle's, Inc. v. NLRB,
588 F.2d 943 (5th Cir. 1979) 15

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15,16

Dowd v. International Longshoremen's Association,
975 F.2d 779 (11th Cir. 1992) ..... *passim*

Humphrey v. International Longshoremen's Association,
548 F.2d 494 (4th Cir. 1977) 9

International Longshoremen's Association v. Allied International, 456 U.S. 212 (1982) 4

Longshoremen (Shipside Packing Co.),
227 N.L.R.B. 659 (1976) 13

NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951) 9

North American Van Lines, Inc. v. NLRB,
869 F.2d 596 (D.C. Cir. 1989) 15

Page(s)

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 14

United Pipefitters Local 280 (Aero Plumbing Co.), 184 N.L.R.B. 398 (1970) 13,14

Walsh v. International Longshoremen's Association, 630 F.2d 864 (1st Cir. 1980) 9

Statutes:

29 U.S.C. § 152(13) 7

29 U.S.C. § 158(b)(4)(i) ..... *passim*

29 U.S.C. § 158(b)(4)(ii) ..... *passim*

29 U.S.C. § 160(l) 8,9

Miscellaneous:

Restatement (Second) of Agency (1958) 11

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Respondent International Longshoremen's Association, AFL-CIO, ("ILA") submits this brief in opposition to the petition for a writ of certiorari filed by Canaveral Port Authority, Coastal Stevedoring Company and Port Canaveral Stevedoring, Ltd.. The ILA was the petitioner in the review

proceedings which gave rise to the decision below. Petitioners herein were intervenors below. The National Labor Relations Board ("NLRB"), which was the respondent and unsuccessful party before the District of Columbia Circuit, did not seek review by the Supreme Court. Respondent ILA is informed that the Board through the Solicitor General intends to submit respondent's brief on this petition.

STATUTORY PROVISIONS INVOLVED

Section 8(b)(4)(i)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i)(B), Pet. 2-3,[1] although omitted from the petition's statement of Statutory Provisions Involved, is highly relevant to this case. The material portions of the statute, including the language deleted by petitioners, are:

> It shall be an unfair labor practice for a labor organization or its agents —
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> . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

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[1] References to the Petition will be denoted "Pet. _____." References to the Appendix to the Petition will be denoted "App. at _____."

. . . (B) forcing or requiring any person to cease . . . doing business with any other person, . . .

STATEMENT OF THE CASE

Petitioners seek review of a decision of the Court of Appeals for the District of Columbia which granted the ILA's petition to review and set aside a decision of the NLRB and denied the Board's cross-petition for enforcement. By attributing the conduct of Japanese trade unions acting in Japan to the ILA on a theory of "agency," the NLRB had ruled that the ILA violated the secondary boycott proscriptions of the National Labor Relations Act ("NLRA"). The foreign unions in support of the ILA's dispute with employers in Florida threatened to refuse to unload from ships in Japan fruit that had been loaded in Florida by non-union labor. The circuit court overturned the NLRB's determination, holding that the Board had erred in finding that conduct in Japan by Japanese unions could be attributed to the ILA because the American union's request and thanks for support made the Japanese unions its agents. The court unequivocally dismissed the Board's theory as unsupported by precedential authority and premised on an erroneous application of agency law principles.

With minor reservations, which do not go to the question of whether this Court should grant review, Respondent ILA is in basic agreement with the petition's statement of the facts and proceedings below, though not with the characterizations petitioners seek to impose on them.

REASONS FOR DENYING THE WRIT

The petition sets forth six untitled arguments which it hopes will induce this court to grant a writ of certiorari. Most of these are mere expressions of disappointment with the decision below and never rise to the level of reasons —even insufficient reasons— for granting the writ. None is important, much less compelling. Basically, the petition should be denied because there is nothing in this simple, straightforward, albeit unusual case that warrants review by the Supreme Court.

1. The Decision of the D.C. Circuit Does Not Undermine But Furthers the Congressional Policy Enacted in the NLRA

Petitioners' first line of attack is to suggest that the decision of the District of Columbia Circuit somehow undermines the goals and purposes of the secondary boycott proscriptions of the NLRA as articulated by this Court most recently in *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212 (1982). Pet. 11, 13-14. This argument presents not so much a reason for Supreme Court review as a philosophical disagreement between petitioners and the court of appeals. At bottom, petitioners' claim of error by the D.C. Circuit is really a divergence in jurisprudential approach. Like the NLRB and the Eleventh Circuit in *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir. 1992), reproduced at App. at 50a-72a, petitioners see the NLRA as articulating general national labor policies and setting loose the NLRB to further those policies. In their view the Board has *carte blanche* so long as its actions are not specifically forbidden. The Eleventh Circuit, cited with approval by the Board, *see* App. at 40a-41a, concludes, "[N]othing in the text or intent of the NLRA compels us to allow the ILA to evade responsibility . . ." *Dowd*, App. at 72a.

Thus, the dominant appeal in the petition is to policy considerations and to the general principle that the Board's role is to apply its expertise to formulate national labor policy. *See* Pet. 28-29; *cf.* App. at 38a ("We further believe that policy considerations support a finding of agency here."). Petitioners predict catastrophes looming in the wake of the court of appeals' decision, Pet. 23-28, and reason that, because the NLRA proscribes secondary boycotts, the Board has limitless power to prevent them whenever and wherever they may be suspected. Pet. 11-13. The linchpin proposed for this rationale is that the Board is allowed to "liberally" construe agency concepts to effectuate the policies and purposes of the Act. *See* Pet. 11-12; 15-16. This is nothing more than a demand that the traditional agency principles which Congress incorporated in the statute yield to the Board's outcome oriented attitude. The elastic approach taken by the NLRB in applying agency principles, here, however, expanded the concept of liberal construction beyond the breaking point.

The court of appeals was eminently correct in rejecting the notion that the end of avoiding a secondary boycott justifies the means of faulty legal analysis. The court based its decision on a careful examination of the structure of the NLRA, its legislative history and judicial precedent. App. at 14a-21a. It observed that the Act does not contain a blanket prohibition of secondary activity. Rather, it is carefully crafted by Congress to outlaw certain well-defined conduct. App. at 21a. The decision below cites the Act's adoption of common law agency principles and thoroughly examines the legislative and judicial rationale for that inclusion. App. at 14a-15a. It recognizes that Congress limited the § 8(b)(4)(i) proscription against inducing employees of employers in commerce. App. at 11a. It refuses to allow the Board to use § 8(b)(4)(ii)'s proscription against threats to employers to make up for the lack of induced domestic employees in this case through the device of bogus agency labels. In short, the court of appeals saw clearly that,

while the Board certainly has the authority to apply its expertise and make policy, that power must be exercised within the legislated framework, that even the NLRB is not authorized to go beyond the Act Congress passed by twisting the statutory language and mangling agency concepts to achieve a preordained result which it deems desirable.

The court of appeals properly recognized that the NLRA as enacted by Congress does not prohibit what the ILA did in this case, for the union's conduct fell neither under § 8(b)(4)(i) nor § 8(b)(4)(ii). The court's only sin was to not permit the NLRB to correct that perceived flaw in the statute by manipulating agency concepts. In conclusion, the court of appeals admonished that any changes to the Act's provisions must be made by Congress, not by the Board or the courts. App. at 22a. In our polity this attitude can not be faulted.

Petitioners urge a policy of winking at the NLRB's perversion of the statute's language in the name of serving the purpose of the statute. That policy is patently mischievous, and its rejection by the court below does not warrant this Court's review.

2. The Decision Below Does Not Conflict With the Decision of Any Other Court

Petitioners conjure up "conflicts" between the decision below and other courts in not one, but two, areas. Unfortunately for petitioners, neither of the perceived antagonisms amounts to a real conflict.

First, petitioners claim that the "D.C. Circuit's strict application of common law principles to the NLRA is in conflict with the approach of virtually every other circuit." Even if true, this kind of disagreement would afford no ground for granting the writ. And the claim is not true but is premised

upon a misconstruction of what the court of appeals did.[2]

While conflicts among the circuits are a classic ground for granting Supreme Court review, the conflict must be between *decisions* of courts of appeals, not merely between their "approaches." Indeed, that petitioners must fall back on the imprecise term "approach" to construct a disagreement in the circuits itself demonstrates that no real conflict such as would warrant granting the writ exists.

Moreover, petitioners mischaracterize the D.C. Circuit's approach. That court like others has recognized that in the framework of the NLRA agency principles are to be applied broadly, *see* App. at 19a. It in no way retreated from that position in this case. Here, however, the Board went far beyond liberal application of agency law, and the lower court, mindful of the express provisions of NLRA § 2(13), 29 U.S.C. § 152(13), was not willing to jettison agency principles altogether. Far from being out of sync with other circuits or the NLRB itself, the D.C. Circuit noted that the Board and its allies could not point to a single decision, judicial or administrative, as precedent for its finding of agency in this case.[3]

The court did not, as petitioners suggest, hold that common law agency principles should be "strictly applied" in a labor law setting. *See* Pet. 15. Rather, it found

> . . . the Board's theory depends not upon a liberal construction of agency principles, but upon

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[2] This attempt to manufacture a conflict among the circuits by citing cases which apply a liberal agency analysis after NLRA § 2(13), 29 U.S.C. § 152(13), was enacted, Pet. 15-16, n. 8, is easily deflated. None of those cases addressed the issue before the Board and the D.C. Circuit.

[3] Nor do petitioners succeed in establishing a conflict among the circuits on the deference to be accorded Board decisions. The cases cited at Pet. 16, n. 9 hold that deference is given to factual findings by the Board. In this case the facts were stipulated to and the Board drew from them the legal conclusion of agency status to which the court does not defer.

a complete abrogation of such principles.

App. at 21a.

Second, petitioners urge that the D.C. Circuit's decision conflicts with that of the Eleventh Circuit in *Dowd*, the related NLRA § 10(l), 29 U.S.C. § 160(l), injunction proceeding that preceded the Board's decision on the merits. If true, this claim would present a classic ground for Supreme Court review, though hardly of enough importance to warrant granting the writ. But the claim is not true. Any disagreement between the District of Columbia and the Eleventh Circuit as to the merits of the Board's agency theory is not the kind of conflict that requires resolution by this Court.

The *Dowd* court was reviewing the issuance of a preliminary injunction by a district court under a standard of review of whether the Board's legal theories were substantial and nonfrivolous. *See* App. at 54a-55a. The Eleventh Circuit's discussion of the agency relationship between the ILA and Japanese unions is classic dictum. It goes well beyond what was required to decide the case before the court and delves into the merits of the alleged unfair labor practice. The Eleventh Circuit's actual holding, however, is limited to the determination that the Board had reasonable cause to believe the NLRA was being violated. This is not to deny that the Eleventh Circuit panel undoubtedly takes a view of the Board's theory of agency contrary to that of the D.C. Circuit in this case.[4] It cannot be seriously maintained that dictum, however strenuous, is sufficient to create a conflict between courts of appeals so as to warrant the involvement of this

[4] Indeed, the Eleventh Circuit went even further than the Board ultimately did in finding some theory on which to attribute the conduct of the Japanese unions to the ILA. The court of appeals found reasonable the Board's General Counsel's theory that the ILA and Japanese unions were engaged in a "joint venture." App. at 61a-62a.

Court.[5]

Because the district court and any reviewing court must prescind from consideration of the merits of the underlying unfair labor charge and base their decisions solely upon whether reasonable cause exists to believe a violation has occurred, *Dowd*, App. at 54a, decisions on applications for § 10(l) injunctions are not binding via the doctrine of preclusion on the NLRB in its own determination nor on the circuit courts on petitions for review and enforcement of Board orders. *NLRB v. Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 682 (1951). Given the lack of preclusive or precedential value, except in other § 10(l) proceedings, *See Walsh v. International Longshoremen's Ass'n*, 630 F.2d 864 (1st Cir. 1980), a decision under § 10(l), even by a circuit court, is not on an equal footing with other court decisions so as to create a conflict triggering this Court's review. To view the matter otherwise would be to create an inside track towards obtaining a writ every time an NLRB decision is reversed in a case where the agency had previously obtained, virtually for the asking, relief under § 10(l).

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[5] The reality is that a court's preview on a § 10(l) injunction proceeding of what position it may take on the merits of the underlying unfair labor practice charge is less than reliable. Courts can and often do come to different conclusions in subsequent review proceedings. *Compare Humphrey v. International Longshoremen's Ass'n,* 548 F.2d 494, 499-500 (4th Cir. 1977) (the Fourth Circuit, noting that its function in reviewing a § 10(l) injunction proceeding concerning the legality of contractual work preservation rules was preliminary and not a decision on the merits, stated, "[t]hus, if this matter were before us for final decision, we would be inclined to hold that the rules . . . constitute a 'hot cargo agreement' in violation of § 8(e)"), with *American Trucking Ass'ns v. NLRB*, 734 F.2d 966, 980 (4th Cir. 1984), *aff'd*, 473 U.S. 61 (1985) (where on subsequent review of the Board's adjudication that some of the same contractual work preservation rules violated the NLRA, the Fourth Circuit said, "[w]e hold that the Rules are lawful in their entirety and may be enforced").

3. The Court of Appeals Properly Thwarted the NLRB's Attempt to Misapply the Law of Agency

Petitioners devote their greatest energies to an effort to show that the court of appeals erred in applying the law of agency within the context of the NLRA. *See* Pet. 16-22. Were they correct, it would still not be a ground for granting the writ, since the Supreme Court does not sit as a court of errors and appeals to correct the lower courts' mistakes in the application of common law principles. But petitioners are in error. The D.C. Circuit was eminently correct in rejecting the Board's agency concoction.

It profits little to here address and expose the fallacies of each pot-shot petitioners take at the decision below. All petitioners' arguments suffer from the same underlying error. They seek to perpetuate the Board's Procrustean effort to stuff the facts of this case into traditional concepts of agency, where they simply will not fit. A request becomes "authorization," a thank you "ratification," the mere mention of the ILA by the Japanese unions "apparent authority." Petitioners' real quarrel with the D.C. Circuit is that the court refused to permit the NLRB to play these Orwellian word games.[6]

Petitioners zero in on the court's recognition that the ILA had no control over the Japanese unions to urge the mutually contradictory arguments (1) that the D.C. Circuit erroneously believed that right of control is a *sine qua non* for an agency

[6] That petitioners — and the Board — feel compelled to enlist several mutually exclusive agency concepts is most telling. There is no doubt that the ILA asked the Japanese unions for help. If that amounted to "authorization," then no "ratification" was required to create, *post hoc*, authority that had never been given. And no one denies that the ILA thanked the Japanese unions. If this were "ratification," if there was both authorization and ratification, there is no need to invoke "apparent authority." This belt and suspenders *and* buttons approach by the Board betrays an obvious lack of confidence in any of them to bear the weight of its theory.

relationship and (2) that the ILA did have sufficient control to meet the test set forth in the *Restatement (Second) of Agency*, § 1 cmt. b. (1958). Pet. 16-18. The latter claim is the wonderful tautology that there must have been control because when the ILA asked for help, the Japanese unions gave it, and when the ILA asked them to stop, the Japanese unions stopped.

All petitioners' attempts to apply common law agency concepts to the circumstances of this case suffer from a common conceptual flaw. They fail to recognize the basic ingredient of agency that an agent acts in the place and stead of the principal, doing what the principal himself could do. All the palaver about how much control is necessary,[7] *see* Pet. 17-19, pales in significance next to this key concept of agency. When we say that an agent is acting "on behalf of" a principal, we do not mean he is doing something nice for the principal or something that will benefit the principal. We mean that he is doing something that the principal has the capacity to do.

The illustration of an agency relationship from the *Restatement (Second) of Agency*, § 1 cmt. b., proffered by petitioners, *see* Pet. 17, is instructive with respect to all petitioners' misapplications of agency principles. In the example, A asks a friend, B, "to do a slight service for him, such as to return for credit goods recently purchased from a store." *Id.* The *Restatement* correctly states that in returning the goods

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[7] Petitioners wrong the court of appeals by suggesting that the decision both makes a permanent relationship the *sine qua non* of agency and also implies that independent entities cannot be agents of another. *See* Pet. 17-19. The D.C. Circuit did not indulge in absurdities. A principal and agent must be separate entities, otherwise one would have not agency but identity. The court was not saying that permanence or identity are always necessary to agency. Rather, it was pointing out that the only precedent the NLRB could invoke had those attributes and so failed to provide any authority for the Board's agency holding in this case, where they were lacking. The circuit court also recognized the self-evident, that there was nothing in the relationship between the ILA and the Japanese unions that could justify calling that relationship agency.

B is acting as A's agent. The example applies throughout the various agency concepts that petitioners, like the Board below, attempt to engraft onto this case. A has given B the goods and asked him to return them to the store (express actual authority). A has not asked B to return the goods, but B takes them anyway on his own initiative, and afterwards A approves his conduct and thanks him (ratification). B shows up at the store with the goods the storekeeper knows to be the ones sold to A and requests a credit to A's account (apparent authority).

But note: in each application of the example *the goods that B was returning were A's goods*. The story is very different if one substitutes B's goods, — if A, who has a dispute with the store, asks B to support him by withholding B's patronage and returning goods that B has purchased. A cannot compel or direct B with respect to B's property. A cannot "authorize" B to return B's own goods. A's thank you cannot make A in any way retroactively responsible for B's conduct with respect to B's goods, so as to be called ratification. A storekeeper receiving back from B the goods sold to B cannot be misled into thinking that B is acting for A.

In this case the Japanese unions, B, acted solely with respect to their own goods, —*i.e.*, the labor of their own members. Their threats in Japan, which the NLRB found to be the only conduct that violated the Act, App. at 32a, 38a,[8] were not that the ILA would refuse to handle but that the Japanese dockworkers would refuse to handle goods loaded by nonunion labor. The message that the Japanese unions were conveying to their employers was not a communication from the ILA; it was their own message. The ILA had no power to call

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[8] The NLRB conceded that the activities of the ILA were not part of the allegedly unlawful conduct. App. at 32a. "All the allegedly unlawful acts were committed solely by the Japanese unions." *Id.* It recognized that the Japanese unions in Japan were not subject to the Act. App. at 34a. It created a "secondary boycott" by attributing the conduct of the Japanese unions to the ILA solely under an attenuated theory of agency.

a strike in Japan of persons who were not ILA members. It had no authority in Japan that it could delegate. The ILA could request, beg, importune assistance, but it could not direct, —because the goods were B's, not A's. Thus, the conduct of the Japanese unions, though taken at the request of the ILA, can in no rational sense be said to be the conduct *of* the ILA. The court of appeals correctly rejected the Board's attempt to hold otherwise.

In suggesting that the decision held that there must be some formal affiliation for an agency to exist, petitioners again do the court of appeals an injustice. The issue of affiliation came up in the context of the NLRB's reliance on two earlier decisions, *United Pipefitters Local 280 (Aero Plumbing Co.)*, 184 N.L.R.B. 398 (1970) and *Longshoremen (Shipside Packing Co.)*, 227 N.L.R.B. 659 (1976), as the sole precedent for its decision in this case.[9] The D.C. Circuit held that these cases did not provide the authority the Board required. The decision correctly points out that "in nearly 50 years of Board and judicial precedent" under the NLRA there is not a single case which finds that a relationship like that between the ILA and the Japanese unions is an agency. App. at 4a-5a.

The court easily distinguished the two decisions that the NLRB itself had relied on. Unlike the completely independent unions in this case, *Aero Plumbing* and *Shipside Packing* involved affiliated local unions working for the same employer under the same collective bargaining agreement. Moreover, in attributing the acts of one local to another in those cases the Board did not do so on the theory that one was the agent of the

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[9] Petitioners' claim that the Board applied "well-established precedent", *see* Pet. 11, is hyperbole and overstates the Board's analysis. The fact is that *Aero Plumbing* and *Shipside Packing Co.*, the two cases relied upon by the Board, were never cited by General Counsel or the intervenors or the *amici* or by any jurist in the § 10(l) proceeding, nor were they raised to the Board at oral argument. The cases surfaced for the first time in the Board's decision. Apparently no one else perceived their precedential value.

other. The word "agency" is not mentioned in either decision, except in unrelated contexts (a "business agent," a "collective bargaining agent," etc.). In the absence of precedential authority, the court perceived that the NLRB was saying that the ILA/Japanese unions relationship was an agency because the Board said it was. The D.C. Circuit refused to countenance that kind of Humpty-Dumpty jurisprudence.

None of the cases cited to this Court supplies the precedent lacking in the Board's ruling. They are simply more of the same. Of the two cases cited at Pet. 19, n. 11, one involved affiliated locals governed by the same International Constitution as in *Aero Plumbing*. The other involved unaffiliated unions but was a situation where the unions were jointly seeking work at a job-site and jointly threatened the employer, thus falling into the "joint venture" category, which the Board declined to adopt as a basis for its decision.[10] The cases cited as authority that one union can be the agent of an independent union, *see* Pet. 19, n. 12, involve either unions engaged in a joint venture or a trades council with its own constitution and by-laws which was held to be a separate labor organization from its constituent affiliated local unions. The cases cited at Pet. 20-21, nn. 13, 14, involve persons actually engaged by unions to solicit authorization cards in an organizational campaign or union members and representatives whose acts in picketing are attributable to their union. The cases cited at Pet. 21, n. 17, involve strangers acting as "organs of communication" of an employer's — not their own — message. These

[10] In the *Dowd* litigation and before the NLRB, the Board's General Counsel and petitioners herein had urged "joint venture" as an alternative theory to impose vicarious liability on the ILA. The Board's subsequent decision on the merits rejected the joint venture theory and relied solely on agency. In this Court, petitioners seek to resurrect the "joint venture" theory on which the Board did not rely. *See* Pet. 19, n. 12. This is, of course, impossible under *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943), which requires that an administrative decision be reviewed on the grounds adopted by the agency.

"perception of authority" cases are indistinguishable from *Cagle's, Inc. v. NLRB*, 588 F.2d 943 (5th Cir. 1979), which the D.C. Circuit analyzed and rejected. App. at 20a-21a. In rejecting these cases as precedent in the situation where the Japanese unions were stating their own, not the ILA's intention, the decision below in no way threatens application of their principle in the appropriate circumstances, as petitioners would suggest. *See* Pet. 21.

Petitioners ultimately fall back on the old argument that the court of appeals applied the wrong standard of review by according "no deference" to the Board's legal analysis rather than the considerable deference required by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and other decisions of this Court. *See* Pet. 28-29. On the contrary, the "limited deference" accorded by the Circuit, *see* App. at 15a, was in perfect consonance with the law's demands. This case was before the NLRB on a stipulated record. Pet. 7. The Board's determination of agency was purely a conclusion of law. It involved not an interpretation of the labor act but *common law* principles of agency, which the NLRA explicitly incorporates. *See* App. at 14a. Thus, the NLRB's labor law expertise was not implicated, and the court was in as good —if not better— a position to make the legal conclusion as the Board.[11] Even so, the court went further than the limited deference analysis. Citing *Chevron*, the decision notes that if full deference were accorded, the Board's decision was so lacking in legal support, it would still be rejected as an unreasonable interpretation of agency law.

[11] The court of appeals relied upon well-established precedent in the circuit: *Aurora Packing Co. v. NLRB*, 904 F.2d 73 (D.C. Cir. 1990) and *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989), which held that a Board determination of employee vs. independent contractor status is a determination of "pure agency law" so that deference under the *Chevron* doctrine is not applicable and noted further that, where principles of agency law are applied to *undisputed facts*, the Board's administrative expertise is not involved. 869 F.2d at 598.

App. at 16a, n. 5.

4. This Case Is Not of Exceptional Importance So as to Require Supreme Court Review

Petitioners seek desperately to create a counterfeit importance to this case by conjuring up scenarios of lawless unionism and international chaos.[12] *See* Pet. 12, 23-28. The demons fade in the light of reason. The scenario of this case is not likely to be repeated. Here the American union openly sought the help of the foreign union. Were the Board's decision to be upheld, any other unions so disposed will have been well instructed. Requests for help in the future would be more veiled. As the D.C. Circuit noted,

> The Board at oral argument acknowledged that the ILA could have evaded an unfair labor practice finding in this case merely by publicizing its labor dispute with Florida stevedoring companies and then disclaiming responsibility for any assistance offered by other unions, for in that case a critical element of the Board's agency theory—the ILA's request for specific assistance—would be absent. Moreover, the

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[12] Petitioners, like the Board before them, *see* App. at 37a, would insinuate the facsimile machine into their treatment of the case, *see* Pet. 6, 25. This is but an attempt to flavor the case with a sense of immediacy, to inflate its importance by creating an air of contemporaneity. *Fin de siecle* worldwide communications had nothing to do with the material events in this case. The dispositive actions —the Japanese unions' decision not to handle and the communication of that threat to their employers —all took place in Japan. The information was transmitted to the Japanese recipients well before the fateful date when the threats would be executed and was no more effective than if carried by Pony Express. That companies in the United States learned of their misfortune through the miracle of modern fax changes the realities not a whit and is completely irrelevant.

> Board's theory appears to have little application beyond this case. Even were we to uphold the Board's decision, unions in future cases surely could seek aid from their foreign counterparts without expressly soliciting such assistance as the ILA did here.

App. at 22a.

To resurrect the NLRB decision, then, would be a venture in futility. The expenditure of the resources of this Court is hardly warranted to reinstate a Board decision that is intrinsically impotent.

Petitioners' cry of "Wolf!" is particularly disingenuous when they claim that the decision "would allow unions in the United States to make unlawful threats through the intermediary of unions that are not part of the same international." *See* Pet. 27. Actually, the court of appeals' decision could apply only in unusual and discrete situations involving foreign unions. Had the same conduct involved two American unions, it would be proscribed by NLRA § 8(b)(4)(i), which forbids the inducement of employees of an employer in commerce to strike or refuse to handle goods. Since the Japanese unions' members' employers, stevedores in Japan, are not in commerce, the Board could not invoke subsection (i) but had to proceed under § 8(b)(4)(ii), which prohibits a union from threatening or coercing.[13] But, as the Board always conceded, the only threats or coercion emanated solely from the Japanese unions, whose activities in their homeland are clearly not

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[13] All the charges originally filed with the NLRB by petitioners herein included a claim that the ILA had violated NLRA § 8(b)(4)(i)(B) "by inducing and/or encouraging a strike, work stoppage, a refusal to perform services . . . ," not merely subsection (ii) of § 8(b)(4). *Cf.* Pet. 6. Seven months later the NLRB issued a complaint based only on a violation of subsection (ii).

subject to American law.[14] App. at 32a, 34a, 41a-42a. Therefore, the Board had to attribute that conduct to the ILA by manufacturing an agency relationship. App. at 33a-38a. See also, App. at 4a, 10a. This gimmick was manifestly intended to do an end run around the limitation of the prohibitions of subsection (i) to domestic employees. The D.C. Circuit, properly deferring to Congress' deliberate choice to include the limitation, refused to permit the Board to twist agency principles so as to deform the legislative enactment. The immediate point, however, is that subsection (i) *does* apply when the induced employees are domestic. Petitioners' alarmist forecast that the decision below will insulate unions from liability for domestic inducement, Pet. 27, just isn't going to happen. The inducement of another domestic union to make threats would be a classic violation of subsection (i).[15]

The reasons why the petition should be denied are apparent immediately within its cover, —in the questions presented. The answer to the first question proposed by petitioners is so apparent that even Respondent ILA would agree. Of course, one union may be the agent of another for purposes of secondary boycott liability, —in the right circumstances, but not in the circumstances of this case. Question 1 would be better posed to a second year law student than to the Supreme Court of the United States.

The answer to the second question is also easily come by

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[14] Petitioners' footnote 24, *see* Pet. 26, gives their game away. They note that in most other nations secondary boycotts are lawful. The Board's decision in this case was designed as a vehicle to allow American businesses to put an end to foreign conduct that, while perfectly lawful where performed, had an effect here. This venture in extraterritoriality was to be accomplished by conscripting the foreign unions under the NLRA as "agents" of domestic unions subject to the Act.

[15] As to the NLRA's lack of a prohibition against inducement of the employees of a foreign employer, petitioners' quarrel is with Congress for not providing a statutory proscription, not with the courts.

without the need of a pronouncement by the highest Court. No formal affiliation or right to control is necessary to find that a union violates the NLRA by encouraging and requesting another union to act, —provided that the second union represents employees of an employer in domestic commerce, so as to implicate § 8(b)(4)(i)(B) of the Act. The NLRB here did not find that Respondent ILA violated § 8(b)(4) by inducing or encouraging, as proscribed by subsection (i), but by threatening or coercing, as forbidden by subsection (ii). To perform that feat, even as it held that all of the unlawful conduct was that of the second, foreign union, the NLRB had to transform the statutory language "induce and encourage" into bogus agency concepts of authorization and ratification. The D.C. Circuit refused to permit this sophistry.

The futility of petitioners' application to this Court becomes apparent when one considers that they proffer here the selfsame arguments they made to the District of Columbia Circuit in their petitions for rehearing with suggestion for rehearing *in banc*, —importance of the case, conflict with other circuits, misapplication of agency law. The circuit court found none of these sufficient to warrant rehearing, nor should this Court find them grounds for granting the writ.

Finally, petitioners' claims of the importance of this case are belied by the attitude of the NLRB itself. That the principal unsuccessful party, the respondent and cross-petitioner before the court of appeals, did not in the first instance seek review by the Supreme Court or join in the petition speaks loudly with respect to the significance of the case. It speaks louder still when that party is the victim of what petitioners suggest is usurpation by the circuit court of the Board's role as policy maker and interpreter of the NLRA. It speaks trumpet-tongued when that party is the National Labor Relations Board, the agency charged with the administration of national labor law. If the Board in its expertise did not think this case

worthy of a petition for a writ of certiorari, petitioners' protests to the contrary can be viewed only as disappointed murmurings.

Nor can the matter be altered by whatever position the NLRB may take in the respondent's brief it will file on the petition of the intervenors below. Should the Board do an about face and now attempt to support the petition, its stance could be seen only as an afterthought, induced by a vain compulsion to uphold the NLRB's decision or by the proddings of the petitioners. In no wise could such a reversal by the Board be seen as a genuine conviction that the decision below requires further review. Indeed, the NLRB has had three opportunities to press that claim, —in a petition for rehearing to the D.C. Circuit, in responding to the petition for rehearing filed by the intervenors below, and in a petition to this court for a writ of certiorari. It defies belief that an agency of the United States would let those opportunities pass if it really believed that further review was appropriate to avoid the parade of horrors petitioners paint, *see* Pet. 12, including constraint of the Board's own ability to enforce the Act entrusted to it by Congress. Whatever position the NLRB may take in the brief to be submitted to this Court, the Board's real convictions in the matter are by now set in concrete and cannot be erased.

CONCLUSION

This case is but another instance of a court properly schooling an administrative agency to act within its legitimate statutory powers. The agency has apparently accepted the lesson, for it thrice let opportunities go by without seeking to disturb the court's decision. In its understanding of the Act, its analysis of the NLRB's decision and its application of common law agency principals, the District of Columbia Circuit's decision is unassailable. In its refusal to let stand the Board's atrocious manipulation of the law of agency, it is praiseworthy. There is simply no reason for review by this Court. The petition should in all respects be denied.

Dated: February 7, 1996

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No. 95-831

In the Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY, ET AL., PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an American labor union violated the secondary boycott provisions of the National Labor Relations Act through its communications with Japanese unions that threatened to refuse to unload in Japan cargo that had been loaded in the United States by nonunion labor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	8

TABLE OF AUTHORITIES

Cases:

Dowd v. *International Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991), aff'd, 975 F.2d 779 (11th Cir. 1992)	4, 9
International Longshoremen's Ass'n v. *Allied Int'l, Inc.*, 456 U.S. 212 (1982)	8
NLRB v. *Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995)	9
Pipefitters Local 280 (Aero Plumbing Co.), 184 N.L.R.B. 398 (1970), enforced *sub nom. NLRB* v. *Southern California Pipe Trades Dist. Council No. 16*, 449 F.2d 668 (9th Cir. 1971)	5

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(b), 29 U.S.C. 158(b)	4
§ 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B)	3-4, 5, 8
§ 10(*l*), 29 U.S.C. 160(*l*)	4

Miscellaneous:

Restatement (Second) of Agency (1958)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 56 F.3d 205. The decision and order of the National Labor Relations Board (Pet. App. 24a-47a) are reported at 313 N.L.R.B. 412.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995. Petitions for rehearing were denied on August 30, 1995. Pet. App. 48a-49a. The petition for a writ of certiorari was filed on November 28, 1995. The jurisdiction of this Court is invoked under 29 U.S.C. 1254(1).

STATEMENT

1. Japan is a major importer of Florida citrus fruit. Before the events at issue in this case, fruit had been shipped to Japan from Ft. Pierce and Port Canaveral, Florida, where it was loaded by employees of petitioners Coastal Stevedoring Company and Port Canaveral Stevedoring, Ltd. Upon arrival in Japan, the fruit was unloaded by Japanese stevedores. Petitioners' employees were not represented by a union, and respondent the International Longshoremen's Association (ILA) had been engaged in labor disputes with petitioners over their failure to hire union-represented employees. Pet. App. 5a, 27a.

Prior to the 1990-1991 citrus export season, ILA representatives visited Japan and met with representatives of several Japanese unions to request assistance from them in preventing the use of nonunion stevedores at Ft. Pierce and Port Canaveral. The Japanese unions responded by asking Japanese stevedoring companies, citrus importers, and shipping companies to ensure that all the citrus fruit they imported was loaded in Florida by stevedoring companies that hired union-represented employees. The Japanese unions also warned that their dockworker members would not unload fruit that had been loaded with nonunion labor. Pet. App. 5a-6a, 28a-29a.

In October 1990, ILA President John Bowers wrote to the Japanese unions to tell them that the ILA was planning to picket nonunion stevedoring companies at Ft. Pierce and Port Canaveral, and to ask for their support. The letter stated that the support of the Japanese unions "in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the

International Longshoremen's Association and organized labor in the United States which supports our effort." The Japanese unions circulated copies of Bowers' letter to citrus importers, exporters and shipping companies. As a result, Japanese importers expressed concern to exporters that fruit loaded by nonunion longshoremen in Florida would not be unloaded by Japanese longshoremen. Pet. App. 6a, 29a.

In late October 1990, after failing to obtain assurances that Japanese dockworkers would unload fruit loaded by nonunion stevedores, one Japanese importer and its carrier redirected a ship from Ft. Pierce to Tampa so that it could be loaded by union longshoremen. An ILA representative wrote to the Japanese unions that the diversion was "a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts." He added that the unions' "continued efforts on our behalf will be most appreciated." Pet. App. 6a-7a, 29a-30a.

During December 1990, several other Japanese importers informed various American exporters that their ships would be loaded at Tampa instead of Port Canaveral because of the threats made by the Japanese unions. Ultimately, those threats caused all Japan-bound citrus fruit to be shipped through Tampa, and none through Ft. Pierce or Port Canaveral, during the 1990-1991 export season. Pet. App. 7a, 30a.

2. In November and December of 1990, petitioners filed unfair labor practice charges against the ILA, alleging that it had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C.

158(b)(4)(ii)(B).[1] The National Labor Relations Board's General Counsel, finding reasonable cause to believe that the charges were true, issued a complaint, and, pending a final determination by the Board, sought and obtained from a district court, under 29 U.S.C. 160(*l*), an injunction directing the ILA to refrain from threatening persons neutral to the primary labor dispute and to repudiate its written request soliciting aid from the Japanese unions. *Dowd* v. *International Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991), aff'd, 975 F.2d 779 (11th Cir. 1992).

After considering the General Counsel's complaint, the Board held that the ILA, acting through the Japanese unions, had violated Section 8(b)(4)(ii)(B) of the Act. The Board explained that "[b]eyond question, the [ILA] attempted to cause economic pressure to be brought to bear against neutral shippers, importers, and exporters involved in the Florida-Japan citrus trade in order to further the [ILA's] primary dispute with nonunion stevedoring

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[1] Section 8(b) provides in relevant part that:

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person[.]

companies in Florida." Thus, "[t]he only aspects of this case which remove it from a textbook scenario of 8(b)(4)(ii)(B) conduct [are] (1) the involvement of foreign entities and (2) the exertions of economic pressure outside U.S. Territory." Pet. App. 34a. The Board found that neither unusual factor was sufficient to insulate the ILA from the proscriptions of Section 8(b)(4)(ii)(B).

The Board acknowledged that ILA's request to the Japanese unions, standing alone, was not unlawful, and that all of the allegedly unlawful threats to boycott cargo loaded by nonunion labor were made "solely by the Japanese unions." Pet. App. 32a, 42a n.17. The Board concluded, however, that the ILA was responsible for those threats under the principles of agency enunciated in *Pipefitters Local 280 (Aero Plumbing Co.)*, 184 N.L.R.B. 398 (1970), enforced *sub nom. NLRB* v. *Southern California Pipe Trades Dist. Council No. 16*, 449 F.2d 668 (9th Cir. 1971).[2] Thus, the Board found that by informing the Japanese unions of its dispute with the nonunion stevedoring companies, requesting supportive action, and then applauding that action and requesting its continuation, the ILA had authorized and ratified the conduct of the Japanese unions. Pet. App. 35a-36a.

The Board further concluded that in this case its jurisdiction extended to consideration of conduct occurring outside the territory of the United States.

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[2] In *Aero Plumbing*, when an employer refused to accept a contract proposal made by Pipefitters Local 280, the local union requested that Pipefitters Local 78, in whose jurisdiction the employer was then working, help get the employer to sign the contract. Local 78 then picketed the employer's jobsite in its jurisdiction. On those facts, the Board concluded that Local 280 was responsible for Local 78's unlawful conduct.

The Board explained that "[a]ssertion of jurisdiction in this case in no way interferes with the laws of Japan or affects the employment conditions of Japanese employees. Our remedial Order simply requires that the [ILA] cease and desist from requesting that the Japanese Unions engage in secondary boycott activities in support of the [ILA]." Pet. App. 41a-42a.

3. The court of appeals denied enforcement of the Board's order. Pet. App. 1a-23a. The court based its decision solely on its conclusion that the ILA was not responsible for the threats made by the Japanese unions. Because that conclusion resolved the case, the court declined to address the question whether the Board had jurisdiction under the Act to examine actions taken in Japan by Japanese unions. *Id.* at 10a.

The court held that because questions of agency under the Act turn on common law rules of agency, it would accord only limited deference to the Board's own agency analysis. Pet. App. 14a-15a. While the court indicated that it would uphold the Board's analysis if it reflected "a choice between two fairly conflicting views" (*id.* at 16a), it concluded that in this case the Board's analysis disregarded the "fundamental principle of hornbook agency law that an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Ibid.* (quoting Restatement (Second) of Agency § 14 (1958)). In the court's view (Pet. App. 17a):

> Here, ILA exercised no control over the conduct of the Japanese unions. To the contrary, the ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the

> goals of organized labor worldwide. We discern nothing in the law of agency to support a theory transforming one union into the agent of another based upon the spirit of labor solidarity alone.

The court acknowledged that the Eleventh Circuit had reached a contrary conclusion in the earlier injunction proceeding in this case, but it noted that in that proceeding the court of appeals was required to find only that the Board had articulated "a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese unions to ILA." Pet. App. 7a. In this case, by contrast, the court below viewed the appropriate standard of review as essentially de novo. *Id.* at 14a-15a. The court distinguished the *Aero Plumbing* case on the ground that the two unions involved in that case were formally affiliated and bound by a common collective bargaining agreement, a relationship "far closer than that existing between the Japanese unions and the ILA." Pet. App. 18a. Similarly, the court held (*id.* at 19a-20a) that cases holding employers responsible for the actions of employees and others during anti-union campaigns were inapposite because, in those cases, "under all the circumstances, employees *reasonably* could have believed that such third parties were acting for and on behalf of the employer" (*id.* at 20a). In the court's view, "nothing in the record [in this case] suggests that any party perceived the Japanese unions to be the agents of the ILA, nor that such a perception would have been reasonably justified had it arisen." *Id.* at 21a.

The court accordingly concluded that "the Board erred in attributing the actions of the Japanese

unions to the ILA for the purpose of an unfair labor practice finding under NLRA section 8(b)(4)(ii)(B)." Pet. App. 22a. The court remanded the case to the Board "for further proceedings consistent with [the court's] opinion." *Id.* at 23a.

DISCUSSION

Section 8(b)(4)(ii)(B) of the Act (see note 1, *supra*) makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce" with the aim of forcing that person "to cease handling * * * or otherwise dealing in the products of any other producer." In this case, Japanese unions threatened to boycott the products of neutral shippers, importers, and exporters involved in the Florida-Japan citrus trade, in order to further the ILA's primary dispute with nonunion stevedoring companies in Florida. That conduct would clearly have violated Section 8(b)(4)(ii)(B) had it been engaged in by an American union in the United States. See, *e.g.*, *International Longershoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212 (1982). Because the threats in this case were made by Japanese unions outside the United States, however, they violated Section 8(b)(4)(ii)(B) only if they are properly attributable to the ILA, and if the Act has at least limited extraterritorial effect.

The National Labor Relations Board in this case determined both that the Japanese unions should be treated as agents of the ILA for purposes of the Act, because the ILA authorized and ratified their actions, and that the Act's proscriptions applied, on the facts of this case, notwithstanding that the threats themselves were made outside the territorial juris-

diction of the United States. The court of appeals rejected the Board's conclusion on the first issue, and did not reach or resolve the second.

The Board believes that the court of appeals should have accorded greater deference to the Board's conclusion that an agency relationship existed on the facts of this case. See generally, *e.g.*, *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453, 455 (1995). The Board did not seek certiorari in this case, however, in light of the following considerations. In the Board's view, the facts of this case are unusual; and the decision below does not fully address even those facts, because the court of appeals declined to reach any question of extraterritorial jurisdiction. The court of appeals found various cases relied on by the Board in reaching its decision to be distinguishable from this case on their facts (see Pet. App. 17a-21a); and, as petitioners acknowledge (Pet. 22), the Eleventh Circuit's decision upholding the Board's request for a preliminary injunction (*Dowd* v. *International Longshoremen's Ass'n*, 975 F.2d 779 (1992)) held only that the Board had articulated "a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese unions to ILA" (*id.* at 784). There is accordingly no clear conflict among the circuits on the facts of this particular case.

If the decision below does prove to have the "far-reaching implications for U.S. trade and labor relations policy" foreseen by petitioners (Pet. 23), that development will become evident through future cases, in which the Board and the lower courts can give further consideration to the legal issues involved

as they arise in concrete factual settings. A more appropriate occasion for review of the matter by this Court might then present itself.

Respectfully submitted.

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FEBRUARY 1996

No. 95-831

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
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PORT CANAVERAL STEVEDORING, LTD.,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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9 pp

TABLE OF AUTHORITIES

Cases: **Page**

Dowd v. ILA,
975 F.2d 779 (11th Cir. 1992) 5, 6

ILA (Shipside Packing Co.),
227 NLRB 659 (1976) 6

NLRB v. Town & Country Elec., Inc.,
116 S. Ct. 450 (1995) 5

Pipefitters Local 280 (Aero Plumbing Co.),
184 NLRB 398 (1970) 6

Statutory Provisions:

29 U.S.C. § 152(13) 6

29 U.S.C. § 158(b)(4)(i) 6

29 U.S.C. § 158(b)(4)(ii) 6

Other Authorities:

Nation's Business, Feb. 1996 2

Restatement (Second) of Agency (1958) 6

IN THE
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INTERNATIONAL LONGSHOREMEN'S
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**On Petition For a Writ of Certiorari
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for the District of Columbia Circuit**

PETITIONERS' REPLY BRIEF

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1. The Solicitor General and the International Longshoremen's Association ("ILA") do not challenge

petitioners' statement of the facts and proceedings below, based upon a stipulated record. (NLRB Br. at 2-8; ILA Br. at 3.) This petition, therefore, presents a pure question of law under the National Labor Relations Act ("NLRA" or "Act.")

2. The ILA contends that this case is not of exceptional importance because the decision of the Court of Appeals "could apply only in unusual and discrete situations involving foreign unions." (ILA Br. at 17.) But "situations involving foreign unions" -- under usual and nondiscrete circumstances -- are precisely those in which this case will have its most pronounced impact on domestic and international trade and labor relations. Thus, when newly elected AFL-CIO President John J. Sweeney was recently asked whether "corporate campaigns" by unions can work better than strikes, he responded:

> Corporate campaigns can be used in nonstrike situations, as well as strike situations, especially in a company where the union has relationships with other unions in other parts of the world. That can be a tremendous force where the company is organized around the world. [*Nation's Business*, Feb. 1996 at 19.[1]]

3. The Solicitor General does not attempt to support the reasoning or conclusions of the Court of Appeals. To the contrary, he states that the court "should have accorded

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[1] The D.C. Circuit's decision does not simply insulate foreign disputes in aid of domestic labor disputes from the application of the NLRA's secondary boycott prohibitions. In its brief, the ILA carefully sidesteps the application of this case which would protect domestic unions that operate through domestic intermediaries that are not "labor organizations." (*See* Pet. at 28.)

greater deference to the Board's conclusion" that there was an agency relationship. (NLRB Br. at 9.) The clear import of that statement is that the Board was right and the court was wrong.

This conclusion is further confirmed by the way the Solicitor General states what he believes should be the controlling rule of law: whether the threats made by the Japanese unions were "properly attributable to the ILA." (*Id.* at 8.) If that were indeed the test adopted by the Court of Appeals, we would not be here. The record leaves no doubt whatsoever but that the threats were "attributable" to the ILA -- that was their *only* source. The ILA sought them, welcomed them, and thanked the Japanese for them once they occurred.[2] In the words of the ILA, "the ILA asked for help, the Japanese unions gave it, and when the ILA asked them to stop, the Japanese unions stopped." (ILA Br. at 11.)

As the Solicitor General concedes (NLRB Br. at 6), that was not the test for an agency relationship established by the court below. The court focused on whether the ILA "exercised ... control" over the Japanese (*id.*) and then went beyond *de facto* control (*e.g.*, over when and how threats would be made, to whom, and when they would stop) to require some level of formal relationship, affiliation or contractual "control." American unions can virtually never be said to exercise control over foreign entities under that restrictive test and therefore are free, under such a test, to engage in conduct on foreign soil that, in the words of the Solicitor General, "would clearly have violated Section

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[2] The Court of Appeals recognized that the ILA "expressly solicit[ed]" the aid of "their foreign counterparts" in this case (Pet. App. 22a), and the ILA treated this aid as being undertaken "on our behalf." (Pet. App. 73a.)

8(b)(4)(ii)(B) had it been engaged in by an American union in the United States." (*Id.* at 8.)

The Solicitor General does not say that the issues in this case are unimportant or not worthy of the Court's attention. Instead, he says that the facts here are "unusual," the Court of Appeals did not reach the jurisdictional question, and if the opinion below has far-reaching implications, the Court can address them in future cases. (*Id.* at 9-10.)

The facts in this case are unusual only in terms of the blatant and open way in which the ILA sought help abroad; this kind of behavior normally is engaged in with more circumspection. The brazen fashion in which the illegal conduct took place is a reason for taking the case, not leaving it alone, because, as noted above, the undisputed facts revealed by the record present a pure legal question.

That the Court of Appeals did not reach the jurisdictional question is also no reason not to review the case. If this Court holds that the Court of Appeals used the wrong test of agency under the controlling statute, the jurisdictional issue can be faced in due course.

Finally, the Solicitor General is simply wrong in his reliance on "future cases." (NLRB Br. at 9.) Under the Court of Appeals' ruling, unions will now be free to engage in this extraterritorial coercive conduct. The NLRB has not challenged the decision of the Court of Appeals. As a result, there may well be no future cases, because the NLRB's General Counsel will never file a complaint. The violations will continue. This case thus represents a last clear chance to stop this illegal conduct in its tracks.

4. The ILA concedes that the D.C. Circuit took a completely different "jurisprudential approach" to the role of the NLRB in the development of national labor policy under

the Act's secondary boycott proscriptions than did the Board itself or the Eleventh Circuit in *Dowd v. ILA*, 975 F.2d 779 (11th Cir. 1992) (Pet. App. 50a-72a); (ILA Br. at 4-5.)

This Term, the Court has reiterated and emphasized the critical role of the NLRB in fashioning national labor policy. The Court said that its "decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995). That is why the Board's views are entitled to "the greatest deference." *Id.* Substituting its judgment for the judgment of the Board, the D.C. Circuit here fashioned its own national labor policy.

5. The Solicitor General points out that the Eleventh Circuit in *Dowd* was using a different standard of review than the D.C. Circuit used (NLRB Br. at 9), and the ILA criticizes and dismisses the Eleventh Circuit's analysis in *Dowd* as dictum. (ILA Br. at 8.) Yet, in rejecting the NLRB's interpretation of "agency," the D.C. Circuit itself acknowledged that the holdings in these two cases cannot be reconciled. (Pet. App. 22a.)[3]

6. The ILA contends that it cannot be held responsible for the threats of the Japanese unions because it had no capacity or power itself to direct the members of the Japanese unions, and an agent can do only "what the principal himself could do." (ILA Br. at 11-13.) The

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[3] The two standards of review are not as divergent as they may first appear. The standard of review in *Dowd* was whether the NLRB General Counsel's legal theory of liability -- and agency -- was "substantial and not frivolous." (975 F.2d at 784; Pet. App. 55a.) The D.C. Circuit stated that the NLRB's interpretation of agency was "wholly unreasonable." (Pet App. 16a n.5.)

Eleventh Circuit in *Dowd* expressly rejected this contention. (975 F.2d at 785; Pet. App. 59a-60a.) The ILA had the power to threaten neutrals, although these threats were unquestionably more effective coming from the Japanese. As the Eleventh Circuit stated, "[w]e decline to reject the Board's theory of agency simply because ILA selected a messenger more capable than itself." (975 F.2d at 785; Pet. App. 60a.) Moreover, as that court also noted, a principal need not always "be able to perform personally the task for which he or she retains an agent." (*Id.*; Pet. App. 60a.) Stated another way, "[t]he master may be liable although the actor is not liable." *Restatement (Second) of Agency* § 212 cmt. c (1958). The ILA also ignores fundamental common-law principles of "ratification" under which a principal may be bound by conduct taken by a third party who was *not* an agent, did not have any actual authority to act, and was not under any right of control. *See id.* at §§ 82, 83 & cmt. b, 85(1), 94.

7. Finally, the ILA gives short shrift to the statutory language itself that governs this case. A determination of an "agency" relationship under Section 2(13) of the NLRA, by its express terms, depends upon whether one person makes another person "responsible for his acts."[4] As the Solicitor General notes in his brief, the Board focused on this question and concluded that the ILA had authorized and ratified the

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[4] The ILA is at its most disingenuous in suggesting that the two cases relied upon by the NLRB, *Pipefitters Local* 280 (*Aero Plumbing Co.*), 184 NLRB 398 (1970), and *ILA (Shipside Packing Co.)*, 227 NLRB 659 (1976), were not "agency" cases. (ILA Br. at 13-14.) In addition, the ILA's purported distinction between Sections 8(b)(4)(i) and (ii) (ILA Br. at 17-18) was rejected by the Eleventh Circuit, rejected by the Board, and accepted for the first time by *any* court in the D.C. Circuit.

conduct of the Japanese unions. (NLRB Br. at 5-6, 8.) The D.C. Circuit, however, imposed its own right-of-control test that is, among other things, bereft of NLRA precedent, directly contrary to the conclusions of the Eleventh Circuit, at odds with the liberal application of agency principles and deference to the NLRB, and oblivious to the common-law precept that ratification may exist without control.[5] The Court of Appeals has issued an unsound decision of widespread significance that merits this Court's review.

For each of the reasons above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] In its brief in opposition, even the ILA has backed away from the D.C. Circuit's discussion of right-of-control by agreeing that one independent union "may be the agent of another for purposes of secondary boycott liability, —in the right circumstances ...." (ILA Br. at 18.) The ILA may agree, but the D.C. Circuit does not.